(17)

No. 05-547
Title: Jose Antonio Lopez, Petitioner
v.
Alberto R. Gonzales, Attorney General
Docketed: November 1, 2005
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (04-2397)
Decision Date: August 9, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 31 2005	Petition for a writ of certiorari filed. (Response due December 1, 2005)
Nov 23 2005	Order extending time to file response to petition to and including January 3, 2006.
Dec 20 2005	Order further extending time to file response to petition to and including January 24, 2006.
Jan 24 2006	Brief of respondent Alberto R. Gonzales, Attorney General filed.
Jan 24 2006	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Jan 25 2006	DISTRIBUTED for Conference of February 17, 2006.
Mar 15 2006	DISTRIBUTED for Conference of March 31, 2006.
Mar 23 2006	Supplemental brief of petitioner Jose Antonio Lopez filed. (Distributed)
Mar 27 2006	DISTRIBUTED for Conference of March 31, 2006.
Apr 3 2006	Petition GRANTED The petition for a writ of certiorari in No. 05-7664, Toledo-Flores v. United States, is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
May 12 2006	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including June 19, 2006.
Jun 16 2006	Brief amici curiae of Center for Court Innovation, et al. filed.
Jun 19 2006	Brief of petitioner Jose Antonio Lopez filed.
Jun 19 2006	Brief amicus curiae of American Bar Association filed. VIDED.
Jun 19 2006	Joint appendix filed.
Jun 19 2006	Brief amicus curiae of Former General Counsels of the Immigration and Naturalization Service filed.
Jun 19 2006	Brief amici curiae of Asian American Justice Center, et al. filed. VIDED.
Jun 19 2006	Brief amicus curiae of Human Rights First filed. VIDED.
Jun 19 2006	Brief amici curiae of NYSDA Immigrant Defense Project, et al. filed. VIDED.
Jul 14 2006	SET FOR ARGUMENT on Tuesday, October 3, 2006.
Jul 17 2006	CIRCULATED.
Jul 17 2006	Extension of time within which to file respondents' brief on the merits to and including August 23, 2006.
Jul 19 2006	Motion for divided argument filed by petitioners. VIDED.
Aug 14 2006	SET FOR ARGUMENT on Tuesday, October 3, 2006.
Aug 14 2006	Record received from U.S.C.A. for 8th Circuit. (1 envelope).
Aug 23 2006	Brief of respondent Alberto R. Gonzales, Attorney General filed. VIDED. (Distributed).

Aug 23 2006	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed. (Distributed)
Aug 23 2006	Brief amici curiae of Texas, et al. filed. VIDED. (Distributed)
Sep 1 2006	Motion for divided argument filed by petitioners GRANTED. VIDED.
Sep 18 2006	Reply of petitioner Jose Antonio Lopez filed. (Distributed)
Oct 3 2006	Argued. For petitioner Lopez: Robert A. Long, Jr., Washington, D.C. For petitioner Toledo-Flores: Timothy Crooks, Houston, Tex. For respondents: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

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No. 05-

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in accord with the Fifth Circuit and in conflict with the Second, Third, Sixth, and Ninth Circuits, held that a state-law felony that would be punishable only as a misdemeanor under federal law is nonetheless an "aggravated felony" for purposes of immigration law. Certiorari should be granted to resolve the split in the circuits, which undermines the longstanding policy of national uniformity in enforcement of the immigration laws.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 417 F.3d 934. The opinion of the Board of Immigration Appeals, App., *infra*, 8a, and the oral decision of the Immigration Judge, App., *infra*, 10a are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2005. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Immigration and Naturalization Act ("INA"), Section 101(a)(43), defines "aggravated felony," and it provides, in pertinent part:

> The term "aggravated felony" means—
>
> * * *
>
> (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in

section 924(c) of title 18, United States Code);

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

8 U.S.C. § 1101(a)(43).

Section 924(c) of title 18 provides, in pertinent part:

> For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

18 U.S.C. § 924(c)(2).

INA Section 240A provides, in pertinent part:

> Cancellation of removal; adjustment of status
>
> (a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of

an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b.

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether a noncitizen convicted of a drug crime that is a felony under state law, but that would be punishable only as a misdemeanor under federal law, has committed an "aggravated felony" for the purposes of the immigration law.

1. The INA's Definition Of "Aggravated Felony" And "Drug Trafficking Crime." Under the INA, a noncitizen who has been convicted of a violation of a state, federal, or foreign drug law is deportable, unless the violation was "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i). A noncitizen who has been convicted of an "aggravated felony" is likewise deportable. 8 U.S.C. § 1227(a)(2)(A)(iii).

Determining what "aggravated felony" means under the INA requires navigating what has been described as "a rather confusing maze of statutory cross-references." *United States* v. *Placios-Suarez*, 418 F.3d 692, 694 (6th Cir. 2005). Section 101 of the INA defines "aggravated felony" as "illicit trafficking in a controlled

substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(b). Section 101 further provides that the term applies to an offense "whether in violation of Federal or State law." *Id.* at § 1101(a)(43). On its face, the section defines two categories of drug convictions that may be considered an aggravated felony: State or federal offenses that involve "illicit trafficking" of a controlled substance and those that fall under the definition of "drug trafficking crime" in Section 924(c) of title 18.

Section 924(c) of title 18, in turn, defines "drug trafficking crime," as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*)" and two other federal laws not at issue here. This case presents a question upon which the circuits have split: namely, whether "any felony punishable under the Controlled Substances Act" includes a state-law felony that would be punishable only as a misdemeanor under federal law and that does not contain a trafficking element.

2. Consequences Of An "Aggravated Felony" Conviction. A legal resident alien who is deportable because of a drug conviction (or for other reasons) may apply for discretionary cancellation of removal under INA Section 240A if three conditions are met. 8 U.S.C. § 1229b(a). The alien must: (1) have been lawfully admitted for not less than five years; (2) have been a continuous resident for not less than seven years; and (3) not have been convicted of an aggravated felony. *Id.* An alien who is found to have committed an aggravated felony is ineligible to apply for cancellation of removal.

An aggravated felony conviction also has other serious consequences in the deportation context. A noncitizen who commits an aggravated felony is ineligible for asylum or withholding of removal to a country where his life or freedom would be threatened. 8 U.S.C.

§§ 1158(b)(2)(B) (asylum), 1231(b)(3)(B) (withholding of removal). He is foreclosed from demonstrating good moral character and therefore cannot become a naturalized citizen of the United States. 8 U.S.C. §§ 1101(f)(8); 1427(a)(3). He is barred from reentering the United States for twenty years and is subject to a criminal sanction for illegal reentry of up to twenty years in prison. 8 U.S.C. § 1182(a)(9)(A)(i), 1326(b)(2).

3. Factual Background. Petitioner Jose Antonio Lopez has resided in the United States since 1985. App. *infra*, 18a. In 1990, Lopez became a legal permanent resident under the Seasonal Agricultural Worker program. *Id.* at 2a. Lopez's wife is a citizen of Mexico who resides in the United States pursuant to visas granted in 1994 and 2001. *Id.* at 14a. Lopez and his wife have two children, aged six and nine, who are both American citizens. *Id.* at 13a. Lopez is a homeowner and also owns the Lopez Mexican Store, a grocery in Sioux Falls, South Dakota. *Id.* at 13a, 14a.

Lopez has been arrested once in the 20 years he has spent in the United States. *Id.* at 13a. In 1997, Lopez pleaded guilty to aiding and abetting the possession of a controlled substance by another individual. The offense is a felony under South Dakota law but would only be a misdemeanor under federal law. *Id.* at 2a; 21 U.S.C. § 844 (defining penalty for simple possession). The Immigration and Naturalization Service initiated removal proceedings against Lopez in 1998, contending that he was removable for two reasons. First, the INS argued that Lopez's conviction was a controlled substance violation, rendering him removable pursuant to Section 237(a)(2)(B)(i) of the INA, 8 U.S.C. § 1227(a)(2)(B)(i). Second, the INS argued that Lopez's aiding and abetting possession offense rendered him removable as an "aggravated felony" based on drug trafficking under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

Lopez conceded that the conviction constituted a controlled substance violation and that he was removable for that reason. But he contested whether the conviction was an aggravated felony. In 1998, when the INS instituted removal proceedings, both the Bureau of Immigration Appeals and the Second Circuit had held that a state-law controlled substance felony is not a "drug trafficking crime" and therefore not an "aggravated felony" for deportation purposes if it would not be a felony under federal law. *See Aguirre* v. *INS*, 79 F.3d 315, 317 (2d Cir. 1996); *In re Davis*, 20 I. & N. Dec. 536, 541-42 (B.I.A. 1992).

Lopez was otherwise eligible to apply for cancellation of removal under Section 240A of the INA because he had been lawfully admitted for permanent residence for more than five years and had been a continuous resident for more than seven years. 8 U.S.C. § 1229b(a). Lopez's conviction was not a "drug trafficking crime" or an "aggravated felony" under the then-prevailing precedent, and he applied for cancellation of his removal.

3. The Decision Of The Immigration Judge. The Immigration Judge found Lopez removable on both grounds argued by INS: that he was convicted of a controlled substance offense and that his aiding and abetting drug possession conviction was an aggravated felony based on drug trafficking. App., *infra*, 2a. The latter ruling made Lopez ineligible for cancellation of removal, and the Immigration Judge accordingly denied Lopez's application for cancellation of removal. *Id.*

4. The Eighth Circuit's Decision. The Eighth Circuit affirmed. The court held that "the plain language of the INA, and of the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony." *Id.* at 4a. The court noted that its holding is in

accord with the Fifth Circuit and conflicts with the Second, Third, and Ninth Circuits. *Id.* at 4a-5a.[1]

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Conflicts With That Of Four Other Circuits.

The Eighth Circuit's opinion in this case recognizes the split among the circuits on whether a state law felony that would be punishable only as a misdemeanor under federal law may be an "aggravated felony" for purposes of the immigration laws. App., *infra*, 4a-5a. Other courts have also noted this split. *E.g.*, *United States* v. *Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); ("Courts have adopted two competing interpretations of the phrase 'any felony punishable under' the enumerated statutes in § 924(c)(2)."); *Liao* v. *Rabbet*, 398 F.3d 389, 390-93 (6th Cir. 2005) ("Competing interpretations of the phrase 'any felony punishable under the Controlled Substances Act [CSA]' . . . have developed."); *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004).[2]

The split is even more pronounced than would appear from the Eighth Circuit's decision: The Sixth

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[1] Before turning to the merits, the Eighth Circuit determined that it had jurisdiction to review the petition under INA § 242 as amended. App., *infra*, 2a-3a; 8 U.S.C. § 1252(a)(2)(D). A recent amendment to that section provided an exception for questions of law from the prohibition of review of rulings denying discretionary relief under INA § 240A. *Id.*

[2] The Court regularly grants certiorari to resolve circuit conflicts over the meaning of the immigration laws. *E.g.*, *Fernandez-Vargas* v. *Gonzales* (No. 04-1376, cert. granted Oct. 31, 2005); *Clark* v. *Martinez*, 125 S. Ct. 716, 722 (2005); *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004); *Demore* v. *Kim*, 538 U.S. 510, 516 (2003).

Circuit recently joined the majority of circuits that have considered the issue by holding that a state-law drug conviction is only an "aggravated felony" for deportation purposes if it would be punishable as a felony under the Controlled Substances Act. *Placios-Suarez*, 418 F.3d at 694. On the other hand, one circuit agrees with the Eighth, that a state-law crime may be an aggravated felony for immigration purposes even if it would be punishable only as a misdemeanor under federal law.[3] *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001).

The circuit split described in the Eighth Circuit's opinion warrants review by this Court. The conflict among the circuits creates disparate treatment of aliens depending upon where they reside. Some aliens convicted of simple drug possession are eligible for asylum, naturalization, and cancellation of removal, while others are considered "aggravated felons," ineligible for any of these benefits. This schism violates the fundamental principle that immigration laws should be applied uniformly across the country. Review is warranted because the decision below has exacerbated the circuit split, the Eighth Circuit joining the minority position among the circuits. Failure to review the Eighth Circuit's decision will perpetuate the incongruous treatment of aliens based on geographic happenstance.

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[3] The Bureau of Immigration Appeals has reversed its prior position, and now applies the Fifth and Eighth Circuits' rule in those Circuits that have not decided to the contrary. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002) (reversing former decision that state law felony must be a federal felony to be an "aggravated felony" under the INA).

A. The Second, Third, Sixth, and Ninth Circuits Hold That A Felony Under State Law That Is Only A Misdemeanor Under Federal Law And Does Not Contain A Trafficking Element Is Not A "Drug Trafficking Crime" And Therefore Not An "Aggravated Felony" For Immigration Purposes.

Four circuits have held that a state-law conviction for a drug offense that is punishable only as a misdemeanor under federal law is not a "drug trafficking crime" and hence not an "aggravated felony" under the immigration laws.

Most recently, the Sixth Circuit faced "the unresolved question of determining which interpretation of an 'aggravated felony' should be used in [the Sixth] circuit." *Palacios-Suarez*, 418 F.3d at 697. The court ultimately concluded that a state law drug felony that is punishable only as a misdemeanor under federal law is not a "drug trafficking crime" and therefore not an "aggravated felony." *Id.* at 699-700.

In arriving at this conclusion, the court traced the case law from the first decision of the Board of Immigration Appeals in 1992, which held that a state drug conviction could qualify as an aggravated felony "if the state felony conviction had a trafficking element" or "if the conviction would be punishable as a felony under one of the enumerated federal drug statutes" in Section 924(c)(2) of title 18. *Id.* at 695 (citing *In re Davis*, 20 I. & N. Dec. 536, 541-42 (B.I.A. 1992)) (marks omitted). The court noted that the Second, Third, and Ninth Circuits have expressly adopted the B.I.A.'s holding in *In re Davis*. *Id.* at 695-96. The court then examined those cases that have taken the contrary view, that a state drug conviction is a drug trafficking crime and thus an aggravated felony if "the conviction is a felony under *either state or federal law*" and "the conduct underlying

the conviction is punishable under the CSA (or the other two statutes not at issue here)." *Id.* at 696.[4]

The court rejected the view that the plain language of Section 924(c)(2) requires this broader interpretation of "drug trafficking crime." *Id.* at 697. Instead, the court found that either approach "could be supported by the plain meaning of the statute." *Id.* at 698. The court then looked to the legislative history of Section 924(c)(2). *Id.* at 698-99. The court noted that before 1998, the section "was limited *to only federal felony offenses*," and that the subsequent amendment to the section was titled a "*clarification* of definition of drug trafficking crimes." *Id.* (quoting Pub. L. No. 100-690 § 6212, 102 Stat. 4181, 4360 (1988)) (emphases supplied). The court therefore found that the "original understanding of the term as limited to federal felonies was unchanged." *Id.* at 699. The court concluded that "Congress did not intend for state felony convictions (not involving any element of drug trafficking) to qualify as an 'aggravated felony' under [INA] § 1101(a)(43)(B) if the offense would be punishable only as a federal misdemeanor under the CSA." *Id.* at 699-700.

The Ninth Circuit conducted a similar examination of the circuit split in *Cazarez-Gutierrez* v. *Ashcroft.* 382 F.3d 905, 910 (9th Cir. 2004). Like the Sixth Circuit, the Ninth analyzed the holdings of the Second, Third, and Fifth Circuits, and "ultimately [came]

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[4] *Placios-Suarez* was decided before the Eighth Circuit's decision in this case. At that time, the Fifth Circuit was the only circuit to have interpreted "aggravated felony" in the immigration context to include state law felonies that would be punishable only as a misdemeanors under federal law. Other courts, however, had adopted this view for purposes of the federal Sentencing Guidelines. *Placios-Suarez*, 418 F.3d at 696 (collecting cases).

down on the side of the Second and Third Circuits." *Id.* The court looked to "[t]he presumption that immigration laws should be interpreted to be nationally uniform, evidence that Congress intended uniformity, and prudential concerns" to come to the conclusion that "a state drug offense is an aggravated felony for immigration purposes only if it would be punishable as a felony under federal drug laws or the crime contains a trafficking element." *Id.* at 912.

The Ninth Circuit cited as a basis for its decision "the strong interest in national uniformity in the administration of immigration laws." *Id.* at 912. The court noted that "'the policy favoring uniformity in the immigration context is rooted in the Constitution,'" and quoted Alexander Hamilton writing in The Federalist that "immigration was one of the few powers 'EXCLUSIVELY delegated to the United States.'" *Id.* (quoting *Gerbier* v. *Holmes*, 280 F.3d 297, 311 (3d Cir. 2002), and The Federalist No. 32). The court found that the need for uniformity in the immigration laws is "paramount," and that the Fifth Circuit's definition of "drug trafficking crime" "necessarily incorporates vagaries in state law that create widely divergent immigration consequences for aliens convicted of minor drug offenses in different states." *Id.* at 914.

The court therefore concluded that "a state drug offense is not an aggravated felony for immigration purposes unless it is punishable as a felony under the CSA or other federal drug laws named in the definition of 'drug trafficking crime,' or is a crime involving a trafficking element." *Id.* at 919.

The Ninth Circuit's opinion agreed with the opinions of the Third and Second Circuits before it. In *Gerbier* v. *Holmes*, the Third Circuit held that "a state drug conviction, for deportation purposes, constitutes an 'aggravated felony' if it is either a felony under state law and contains a trafficking element, or would be

punishable as a felony under the federal Controlled Substances Act." 280 F.3d at 312. The court based its decision on "precepts of statutory construction and [] the legislative history of § 924(c)(2)." *Id.* at 299. Further, the court stated that "this conclusion properly reflects the policy favoring uniformity in construction of the INA because it subjects aliens to the same treatment regardless of how different states might categorize similar drug crimes." *Id.*

And the Second Circuit, in *Aguirre* v. *INS*, overruled its prior precedent that "an offense that is a felony under either Federal or state law qualifies as an aggravated felony for purposes of discretionary relief under the [INA]." 79 F.3d 315, 317 (2d Cir. 1996) (overruling *Jenkins* v. *INS*, 32 F.3d 11 (2d Cir. 1994)). The court cited its "frequently expressed concern to avoid disparate treatment of similarly situated aliens under the immigration laws," and "the interests of nationwide uniformity" as considerations that outweighed adherence to Circuit precedent. *Id.*

Four circuits thus hold that a state-law drug felony is not a "drug trafficking crime" under Section 924(c)(2) of Title 18, and therefore not an "aggravated felony" for immigration purposes if it is punishable only as a misdemeanor under federal law. If Petitioner were a resident of any of the states within the Second, Third, Sixth, or Ninth Circuits, his application for cancellation of removal would have been heard before an Immigration Judge. Instead, Petitioner's claim was dismissed based solely on the determination that he had been convicted of an aggravated felony. App., *infra*, 4a.

B. The Fifth and Eighth Circuits Hold That Any State-Law Drug Felony Is A Drug Trafficking Crime And Thus An Aggravated Felony.

Two circuits have taken the contrary position that any state-law drug felony is a drug trafficking crime and therefore an aggravated felony for purposes of the immigration laws. The Eighth Circuit's opinion in this case concluded that "the plain language of the INA, and the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony." App., *infra*, 4a.

The Fifth Circuit has also held that "section 924(c) [means] that a state drug conviction is a 'drug trafficking crime' (and thus an aggravated felony) if '(1) the offense was punishable under the Controlled Substances Act and (2) it was a felony' under either state or federal law." *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001) (quoting *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997)). The court also based its opinion on what it considered to be the "plain language of the statutes." *Id.* at 510.

The Fifth Circuit in *Hernandez-Avalos* and the Eighth Circuit's decision in this case thus directly conflict with the Second, Third, Sixth, and Ninth Circuits on the Question Presented. This split in authority among the circuits alone is reason to grant the writ. Repairing the uniformity of the federal law is of even greater importance in this instance, however, because of the oft-stated interest in uniform application of the immigration laws.[5]

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[5] Several other circuits have interpreted the language at issue in the separate context of the Sentencing Guidelines. Those (...continued)

II. A State-Law Drug Conviction Is Properly Considered A Drug Trafficking Crime And Therefore An Aggravated Felony If It Contains A Trafficking Element Or Is A Felony Under Federal Law.

The lower court decisions holding that a drug possession offense that is a state-law felony but only punishable as a misdemeanor under federal law is nevertheless a "drug trafficking crime" and therefore an "aggravated felony" under the INA are unpersuasive. These decisions conclude that the language of Section 924(c)(2) of title 18 is "plain" and that Congress therefore intended that noncitizens be subject to different consequences under the immigration laws based on variations in how states punish drug offenses. App., *infra*, 4a; *Hernandez-Avalos*, 251 F.3d at 510. Contrary to these courts' decisions, a careful reading of the statutes shows that a state-law felony that would only be a misdemeanor under the federal law is not a "felony" under Section 924(c)(2) of title 18 and therefore not a "drug trafficking crime" or an "aggravated felony" under the INA. Moreover, these cases do not reconcile their holdings with the longstanding policy of ensuring uniform application of the immigration laws.

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courts have held that a state-law drug conviction may be an "aggravated felony" based on drug trafficking even if the conduct would only constitute a misdemeanor under federal law. *See United States* v. *Wilson*, 316 F.3d 506, 512-13 (4th Cir. 2003); *United States* v. *Simon*, 168 F.3d 1271, 1271 (11th Cir. 1999); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 999-1000 (10th Cir. 1996); *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 363-66 (1st Cir. 1996). Although it is unknown whether these circuits would adopt the same view in the immigration context, these cases further reflect the deep and entrenched nature of the split in this case.

A. Section 924(c)(2) Does Not Include State Law Felonies Punishable Only As A Misdemeanor In "Any Felony."

The Eighth Circuit's opinion in this case relied on its prior decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997). The analysis in that case is typical of the courts that have found a state law felony drug possession conviction to be an "aggravated felony" under the INA's definition. *See, e.g., United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997) (relying, *inter alia*, on *Briones-Mata*). The Eighth Circuit in *Briones-Mata* concluded that because Section 924(c)(2) defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act," it should therefore look to the definition of "felony" in the Controlled Substances Act. *Id.* at 309. "Felony" is defined in the Controlled Substances Act as "any Federal or State offense classified by applicable Federal or State Law as a felony." 21 U.S.C. § 802(13).

But Section 924(c)(2) of title 18 defines "drug trafficking crime" as "any felony *punishable under* the Controlled Substances Act." 18 U.S.C. § 924(c)(2) (emphasis added). The provision does not refer to any felony *as defined under* the Controlled Substances Act. As the many cross-references in this statutory scheme attest, Congress knew well how to incorporate a definition from another statute if that is what it wanted to do. Congress did not incorporate the definition of "felony" from the Controlled Substances Act, and the definition of "felony" contained therein is thus inapposite.

Rather, Section 101(a)(43) of the INA refers to title 18 of the United States Code, which is the general federal criminal statute, for its definition of "drug trafficking crime." The more natural reading is that "any felony" as used in Section 924(c)(2) of that title means a felony as otherwise defined in title 18.

Section 3559(a) of title 18 sets forth the framework by which federal crimes are classified as felonies or misdemeanors, and provides that an offense whose maximum term of imprisonment is more than six months but less than one year is a Class A misdemeanor. 18 U.S.C. § 3559(a). Offenses whose maximum term of imprisonment is more than a year fall into several classes of felony. *Id.* To be a "felony" under title 18, therefore, an offense must be punishable under federal law by a maximum term of imprisonment of a year or more.

Simple possession of a controlled substance under the Controlled Substances Act has a maximum penalty of one year in prison, and is thus a Class A misdemeanor under Title 18. 21 U.S.C. § 844. Simple possession is therefore not a "felony" under title 18, and does not fall within 18 U.S.C. § 924(c)(2)'s "any felony" language.

The history of Section 924(c)(2) bears out this interpretation. Before 1988, the provision defined "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." 18 U.S.C. § 924(c)(2) (1982 & Supp. 1986). The pre-1988 version explicitly limited its scope to "felony violation[s] of Federal law," thus excluding state-law offenses. In 1988, Congress amended the section, labeling the amendment as a "clarification." *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat 4181, 4360 (titled "Clarification of Definition of Drug Trafficking Crimes in which Use or Carrying of Firearms and Armor Piercing Ammunition is Prohibited").

The amendment replaced language describing the kinds of "violation[s] of Federal law" that constituted drug trafficking with a listing of three federal laws that each proscribe conduct that is constitutes a felony under title 18. The amendment thus clarified that the "felony violation[s] of Federal law" Congress intended to constitute a "drug trafficking crime" were those felonies

"punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*)." 18 U.S.C. § 924(c)(2).

The circuits that hold otherwise erroneously rewrite Section 924(c)(2)'s reference to "any felony punishable under" the Controlled Substances Act to read any felony "as defined under" that Act.

B. Variations In State Law Should Not Undermine The Uniform Enforcement Of The Immigration Laws.

The decisions of the Eighth and Fifth Circuits do not seriously attempt to reconcile their holdings with the longstanding policy of ensuring uniform application of the immigration laws. That policy counsels that similarly-situated noncitizens who have been convicted of drug possession offenses should be subject to the same rules for asylum, naturalization, and cancellation of removal. The decision below causes severely disparate results to similarly-situated aliens depending on how the state where they live defines or chooses to punish minor drug possession offenses.

Congress expressly recognized the policy of uniformity in the immigration laws when it enacted the Immigration Reform and Control Act of 1986, stating, "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Pub. L. No. 99-603 § 115, 100 Stat. 3359, 3385 (1986). The courts of appeals have often recognized the importance of uniform enforcement of the immigration laws. For instance, the Eleventh Circuit has stated: "The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should

be applied in a uniform manner nationwide . . . ." *Jaramillo* v. *INS*, 1 F.3d 1149, 1166 (11th Cir. 1993); *see also, e.g.*, *Cazarez-Gutierrez*, 382 F.3d at 912; *Gerbier*, 280 F.3d at 299; *Aguirre*, 79 F.3d at 317; *Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen.").

III. The Question Presented Will Not Benefit From Further Consideration In The Courts Of Appeals

To date, six circuits have opined on whether a state-law felony that would be punishable as a misdemeanor under federal law is a "drug trafficking crime" under Section 924(c)(2) of title 18 for purposes of the immigration laws. An additional four circuits have considered this question in the context of the Sentencing Guidelines. *See supra*, n.5. The Board of Immigration Appeals has considered facets of this question in several opinions spanning ten years, initially adopting what eventually became the majority approach in furtherance of uniformity in the immigration laws, and later opting instead to follow the law of the various courts of appeals as they continued to reach different conclusions. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002) (recognizing that "uniformity is presently unattainable"); *In re K-V-D*, 22 I. & N. Dec. 1163 (B.I.A. 1999); *In re L--- G---*, 21 I. & N. Dec. 89 (B.I.A. 1995); *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).

The many decisions of the courts of appeals and the Bureau of Immigration Appeals have examined the text of the statutes in question, their legislative history, and policy considerations favoring uniformity in enforcing the immigration laws. Further decisions are thus unlikely to yield any new analysis. The circuits have

staked out their positions and framed the issue for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2005

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-2397

Jose Antonio Lopez, *Petitioner*,

v.

Alberto Gonzales,[1] Attorney General of the United States, *Respondent*.

Appeal from the Board of Immigration Appeals

June 24, 2005, Submitted
August 9, 2005, Filed

Before MELLOY, HEANEY, and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge:

Jose Antonio Lopez appeals an order of the Board of Immigration Appeals ("BIA") pretermitting and denying his application for cancellation of removal. Lopez argues that his state-law conviction for aiding and abetting the possession of a controlled substance is not an aggravated felony for purposes of the Immigration and Naturalization Act ("INA"). For the reasons discussed below, we affirm.

I. BACKGROUND

Petitioner Jose Antonio Lopez entered the United States in 1986 and adjusted his status to legal permanent

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Alberto Gonzales is substituted automatically for his predecessor, John Ashcroft, as respondent.

residency as a Seasonal Agricultural Worker in 1990. In September 1997, Lopez was convicted of aiding and abetting the possession of a controlled substance (cocaine) in South Dakota. The conviction was a felony under South Dakota law.

The Immigration and Naturalization Service ("INS") initiated removal proceedings against Lopez in 1998. The INS argued that his drug conviction established two separate grounds for removal: it was both a controlled substance violation under INA § 237(a)(2)(B)(i) and an aggravated felony conviction based on drug trafficking under INA § 237(a)(2)(A)(iii). The INS later added charges that Lopez fraudulently obtained his original adjustment of status in 1990. Lopez conceded removability for the controlled substance violation but filed an application for cancellation of removal as a long-time permanent resident pursuant to INA § 240A(a).

In November 2002, the Immigration Judge (IJ) found Lopez removable on both the controlled-substance-violation and aggravated-felony grounds. The IJ also pretermitted and denied Lopez's application for cancellation of removal because INA § 240A(a), 8 U.S.C. § 1229b(a), forbids the Attorney General to cancel removal for an alien convicted of an aggravated felony. The BIA affirmed the IJ's order with a short opinion. Lopez timely appeals the pretermission and denial of his application for cancellation of removal, arguing that his South Dakota conviction was not an aggravated felony for purposes of the INA.

II. DISCUSSION

We first address our jurisdiction to hear Lopez's appeal. Lopez's eligibility for cancellation of removal is governed by INA § 240A. The INA states that "no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 240A." INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). However, the

REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, has added an additional jurisdictional provision to INA § 242. The new provision, INA § 242(a)(2)(D), codifies our jurisdiction to review constitutional claims or questions of law raised in petitions for review of decisions made by the Attorney General under INA § 240A and other sections. *See Fernandez-Ruiz* v. *Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005). Furthermore, the amendment was intended to be retroactive, applying to direct review of orders issued before, on or after the date of the enactment. REAL ID Act § 106(b); *Fernandez-Ruiz*, 410 F.3d at 587. In this case, Lopez raises a question of law as to whether his conviction in South Dakota state court meets the INA definition of aggravated felony. As amended, INA § 242 makes clear that we have jurisdiction to review this claim.

"We review the BIA's legal determinations de novo, 'according substantial deference to the [BIA's] interpretation of the statutes and regulations it administers.'" *Regalado-Garcia* v. *INS*, 305 F.3d 784, 787 (8th Cir. 2002) (quoting *Tang* v. *INS*, 223 F.3d 713, 718-19 (8th Cir. 2000)). We review the BIA's interpretation of federal criminal statutes de novo without according any deference. *Omar* v. *INS*, 298 F.3d 710, 714 (8th Cir. 2002), overruled in part on other grounds, *Leocal* v. *Ashcroft*, 160 L. Ed. 2d 271, 125 S. Ct. 377, 380 (2004).

The requirements for eligibility for cancellation of removal for permanent residents are as follows:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

INA § 240A(a), 8 U.S.C. § 1229b(a).

Lopez argues that his South Dakota conviction for possession of a controlled substance was not an aggravated felony for the purposes of the INA because, although it was a felony under South Dakota law, it would not have qualified as a felony under federal law. However, the plain language of the INA, and of the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony. An aggravated felony is defined as "illicit trafficking in a controlled substance . . ., including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). In turn, a drug trafficking crime is "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*)." 18 U.S.C. 924(c)(2). Finally, "the term 'felony' is defined for the purposes of the Controlled Substances Act (CSA) as 'any Federal or State offense classified by applicable Federal or State Law as a felony.'" *United States* v. *Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997) (quoting 21 U.S.C. § 802(13)).

In other words, for INA purposes, a drug trafficking crime is an offense which would be punishable under 21 U.S.C. §§ 801 *et seq.*, and which would qualify as a felony under either state or federal law. *Briones-Mata*, 116 F.3d at 310 ("The definitions of the terms at issue indicate that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the CSA."); *accord United States* v. *Hernandez-Avalos*, 251 F.3d 505,

510 (5th Cir. 2001); *but see Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910-11 (9th Cir. 2004) (relying on "the presumption that immigration laws should be interpreted to be nationally uniform, evidence that Congress intended uniformity, and prudential concerns" in agreeing with the Second and Third Circuits that "state felony drug offenses are not aggravated felonies for immigration purposes unless the offense contains a trafficking element or is punishable as a felony under the federal laws enumerated in 18 U.S.C. § 924(c)(2)").

Lopez's South Dakota conviction for aiding and abetting the possession of a controlled substance was a felony under state law, even though it only would have qualified as a misdemeanor under federal law. Accordingly, following *Briones-Mata*, we hold that Lopez's state-law drug conviction is an aggravated felony for INA purposes.

Lopez contends that the BIA's reliance on Eighth Circuit precedent in finding that his conviction constituted an aggravated felony was an impermissible retroactive application of a new rule. At the time Lopez was convicted in South Dakota, it was the BIA's position that only crimes which would have qualified as felonies under federal law could support a finding of an aggravated felony. *See In re L-G*, 21 I. & N. Dec. 89 (BIA 1995). Later, in *In re Yanez*, the BIA reversed its earlier position, ruling that:

> In those circuits that have spoken, the determination whether a state drug conviction constitutes a 'drug trafficking crime' under § 924(c)(2), and therefore an aggravated felony under section 101(a)(43)(B) of the Act, shall be made by reference to applicable circuit law, and not by reference to any legal standard articulated by this Board.

23 I. & N. Dec. 390, 397 (BIA 2002). In finding that Lopez's South Dakota conviction was an aggravated felony, the IJ cited the *Yanez* rule and accordingly applied our precedent from *Briones-Mata*. The BIA expressly affirmed the IJ's reasoning.

Lopez cites *INS* v. *St. Cyr*, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), for the proposition that the BIA's "retroactive" application of the *Yanez* rule violated his due process rights. In that case, St. Cyr pleaded guilty to an aggravated felony conviction in March 1996. At the time of his plea, an aggravated felony would not have prevented St. Cyr from obtaining a waiver of deportation (analogous to "cancellation of removal") under INA § 212(c); by the time of his deportation hearing in April 1997, however, § 212(c) had been repealed and replaced with § 240A, under which the aggravated felony barred him from cancellation of removal. The Supreme Court, citing traditional presumptions against the retroactive application of amended statutes, held that aliens who had pleaded guilty to an aggravated felony before the replacement of § 212(c) with § 240A were still eligible to seek cancellation of removal.

In contrast to *St. Cyr*, Lopez pleaded guilty to an aggravated felony in September 1997, months after § 212(c) had been repealed and replaced with § 240A. To avoid the consequences of his aggravated felony, Lopez argues detrimental reliance not on a repealed section of the INA that was in effect at the time of his plea, but rather on the BIA's interpretation of a federal criminal statute at the time of his plea--an interpretation that had no legal force in the Eighth Circuit. *See Hernandez-Avalos*, 251 F.3d at 508 n.3 ("If a circuit court's interpretation of 'aggravated felony' is different from the BIA's interpretation, the INS is bound by the decisions of the circuit court in removal proceedings arising in that circuit."); *Yanez*, 23 I. & N. Dec. 390, 394-96. *Briones-Mata* was published several months before Lopez's guilty

plea in South Dakota and was settled law for removal proceedings arising in the Eighth Circuit regardless of the BIA's conflicting policy at the time of Lopez's plea. *See, e.g.*, *Amaral* v. *INS*, 977 F.2d 33, 36 n.3 (1st Cir. 1992) (noting that a state-law felony conviction was an "aggravated felony" for INA purposes, despite the BIA's failure to rely on that ground). Therefore, the BIA did not retroactively apply a rule in concluding that Lopez's conviction was an aggravated felony for the purposes of the INA under Eighth Circuit precedent.

III. CONCLUSION

We affirm the BIA's order pretermitting and denying Lopez's application for cancellation of removal.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

File: A91 726 777 - Bloomington Date May 11, 2003

In re: JOSE ANTONIO LOPEZ

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(l)(A)] - Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) - Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Cancellation of removal

The respondent appeals from the Immigration Judge's November 22, 2002, decision finding him removable on the two charges listed on the Notice to Appear, pretermitting his application for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), and ordering him removed to Mexico. The Department of Homeland Security (the "DHS," formerly

the Immigration and Naturalization Service) did not appeal the Immigration Judge's finding that the respondent was not removable on the lodged charges. The respondent's appeal will be dismissed.

We find no error in the Immigration Judge's determination that the respondent has been convicted of an offense falling within the definition of aggravated felony contained in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). The Immigration Judge correctly relied on *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997), in finding that under applicable precedent in the United States Court of Appeals for the Eighth Circuit, within whose jurisdiction this matter arises, the respondent was convicted of an aggravated felony. *See Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). The Immigration Judge also correctly found that the respondent's conviction bars him from the requested relief of cancellation of removal. *See* section 240A(a)(3) of the Act. Finally, we agree with the Immigration Judge that the application of *United States* v. *Briones-Mata*, *supra* and *Matter of Yanez*, *supra*, in this case is not impermissibly retroactive. Consequently, we adopt and affirm the Immigration Judge's decision for the reasons stated therein.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

IMMIGRATION COURT

Bloomington, Minnesota

File A 91 726 777 November 22, 2002

In the Matter of

JOSE ANTONIO LOPEZ,) IN REMOVAL
) PROCEEDINGS
Respondent)

CHARGES: 1. Section 237 (a) (2) (B) (i) of the Immigration and Nationality Act, as an alien who at any time after admission has been convicted of a violation of or a conspiracy or attempt to violate any law or regulation of a State, the United States, or a foreign country relating to a controlled substance as defined in 102 of the Controlled Substance Act, 21 U.S.C. 802, other than a single offense involving possession for one's own use or 30 grams or less marijuana.

2. Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as a alien who at any time after admission has been convicted of an aggravated felony as defined in Section 101(a)(43) of the Act.

LODGED CHARGES: 1. Section 237(a)(1)(A) of the Immigration and Nationality Act, as an alien who at time of entry or

adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: aliens who seek to procure, or have sought to procure, or who have procured a visa, other documentation, or admission into the United States, or other benefit provided under the Act, by fraud or by willfully misrepresenting a material fact under Section 212 (a) (6) (C) (i) of the Act.

2. Section 237 (a) (1) (B) of the Immigration Act, as an alien who is present in the United States in violation of law.

APPLICATIONS: 1. Section 240A(a) of the Immigration and Nationality Act, cancellation of removal for certain permanent residents.

ORAL DECISION OF THE IMMIGRATION JUDGE

1. INTRODUCTION AND PROCEDURAL SUMMARY

The respondent is a 33-year-old married male, who is a native and citizen of Mexico. There's a dispute as to when he entered the United States. The Immigration Service charges that he initially entered the United States in May of 1986, as noted in Exhibit 14, allegation 9. Allegation 3 in the Notice to Appear states that he entered on October of 1986. Simply put, the respondent's testimony is that he entered at the end of 1985.

Subsequent to entering the United States, the respondent obtained status as a permanent resident under Section 210 of the Immigration and Nationality Act, the Special Agricultural Worker provisions.

Respondent was placed in removal proceedings on April 17th, 1998, when the Immigration Service filed a Notice to Appear, which is marked as Exhibit 1. In that document, he was charged with removability based on conviction of a controlled substance violation, and also as an alien convicted of an aggravated felony. Based on testimony of the respondent at a prior hearing in this case, the Service issued Forms I-261, the most recent of which is Exhibit 14. That charged that respondent was not in the United States before May, 1986, and, to make a long story short, would not have qualified for the status as a Special Agricultural Worker.

Pleadings have been taken at various times in this case. Suffice it to say that the respondent has conceded that he is removable on the controlled substance charge. The respondent has denied the remaining charges. The Court will discuss the grounds of removability in the analysis section. Suffice it to say that the Court will sustain at both charges in the Notice to Appear and deny both charges in Exhibit 14.

Regarding relief from removal, the respondent is seeking to pursue an application for cancellation of removal for a permanent resident. That application is in Exhibit 7. The respondent testified to support his statutory eligibility to pursue the application. Both sides offered additional documents.

2. THE EVIDENCE PRESENTED

The respondent initially testified in this case in February of 2002. At that time he stated that he had been living at his current address for four years, and was 32 years old. He stated that his first entry into the United States was in May of 1986, when he entered without inspection at San Ysidro. After entering, he lived in Los Angeles for about 10 or 11 years. He worked first in a junkyard called Fred's Auto Breaking. In 1987 and 1988, he did agricultural work, and then received SAW

status. After getting this legal status in the United States he has made basically annual visits to Mexico to visit family.

Respondent married his wife, Maria Delaluz Lopez, in 1994 in Mexico. They have two children, both born in the United States.

Testimony was taken regarding respondent's and his family's activities in the United States. His son, Anthony; has attended school in this country. The respondent lived in San Diego at one point. Except for the time that he was in jail on his criminal charge, he has been employed. He now owns a grocery store, and had operated a taco stand. Respondent's wife works in his business. Respondent's wife has no legal status in the United States nor does she have employment authorization.

Respondent himself has never received welfare in the United States. His children received Medicaid for two years, but no cash assistance.

Respondent was incarcerated on his criminal charge in 1997. Testimony was taken regarding tax returns in this country. Respondent filed as a head of household because his wife didn't have a Social Security number. There appeared to be significant underpayments in taxes.

Respondent has been arrested in the United States one time. This was in 1985 in Huron, South Dakota. The respondent ultimately was convicted of aiding and abetting the possession of cocaine. The individual he assisted was known as Juan Valdez. Respondent pled guilty to the charge. The police searched respondent's home prior to his arrest and found some money that this Juan Valdez had paid the respondent. Valdez told the police that respondent had given Valdez the cocaine. Respondent denies that. Respondent does acknowledge that he referred Valdez to someone who did sell drugs. Respondent knew where you could get drugs in Huron at that time. The respondent denies any other involvement

in drug dealing. As a result of his conviction, he was sentenced to five years incarceration, and served 15 months. His parole had ended shortly before his testimony. It was noted that Juan Valdez had gotten out of prison more quickly than the respondent.

The respondent denies any drug or alcohol problems. He owns the trailer home where he lives. He had filed a visa petition for his wife in the year 2001 and it was approved.

On cross-examination, respondent stated that he attended school in Mexico, completing his education there at the age of 15. He worked for about six or seven months after that in the family jewelry store. He again testified that he entered the United States on May 10th, 1986, which he described as Mexican Mother's Day. This was before his 17th birthday. Regarding his application for SAW status, one of his uncles helped him with the application. He tacitly admitted that he may not have been eligible for SAW status in his initial testimony. The respondent's wife entered the United States August 28th, 1994. She came legally with a visa.

Additional testimony was taken from the respondent today. He first stated that he had made a mistake in saying he entered the United States in May of 1986. He now amended his testimony to say that he entered in December 1985. He states he was 15 or 16 years old when he entered. His first job in the United States was not at the auto wrecking place. Rather he worked on two farms, one in Coachella and another in San Jose. He gave some minimal information regarding the owners of the farms. A Chinese person owned the farm in Coachella, and the farm in San Jose was Bianchi and Sons Packing House. He acknowledged that he had done some review of his situation since his last hearing to come up with these new dates.

Additional testimony was taken from the respondent regarding his criminal conviction. He states that he was represented by a public defender, Gary Blue, at that time. The respondent states that he discussed his immigration status with Blue during the course of the proceedings. Respondent stated that at one time he would have been glad to go to Mexico if he could have avoided jail time. This would have involved him giving up his immigration status. Ultimately the respondent pled guilty. He states that Blue told the respondent that he wouldn't lose his immigration status if he pled guilty. Respondent had no knowledge as to whether or not Blue had consulted with an immigration attorney during the course of the case, or how Blue knew that a guilty plea would not affect respondent's immigration status.

On cross-examination respondent stated he was not well-represented by Blue. No discussion took place in front of the court in the criminal case regarding respondent's immigration status. Blue did not speak Spanish, but used a woman from Texas as an interpreter. Respondent described her as not being a good interpreter. He could not recall her name. The respondent states that he talked with Blue about the guilty plea on the day the case was scheduled to go to trial. Respondent stated that at that time, he was more interested in his immigration status than the length of his sentence if he were to plead guilty. Blue never made any mention to the respondent of applying for any waivers from removability.

Respondent has made an attempt to contact Mr. Blue since the last hearing. Respondent's counsel also reported that she had spoken with Blue. According to respondent's counsel, Blue could not recall telling respondent anything about his immigration status. His notes did not provide any assistance, and Blue was not willing to submit an affidavit.

The Court will note the following from the exhibits in this case: Exhibit 2 includes the conviction records for

respondent. Also in that exhibit is a Form 1-213. This reports the respondent entered the United States in 1986 illegally. The judgment and conviction is at page 2. Respondent was convicted of aiding and abetting the possession of a controlled substance. He was sentenced to five years on this conviction. The information on the charge is set out at page 5. This reflects that the controlled substance involved was cocaine, and the other person who was aided and abetted was Juan Valdez. The South Dakota statute on aiding and abetting is at page 9 of the exhibit, which reflects that those convicted of aiding and abetting are treated as principals. The Court would note that the underlying statute of which respondent was convicted, Section 22-42-5 is set out at page 8 of the exhibit, and reflects that the unauthorized possession of a controlled substance is a felony.

Exhibit 7 is respondent's application for cancellation of removal. The Court would simply note that there are supporting documents included which reflect that respondent was doing well on parole. Also see Exhibit 9. Exhibit 13 is the United States statute on aiding and abetting, 18 U.S. Code, Section 2, which was essentially similar to the content of the South Dakota statute.

3. ANALYSIS

Removability on the controlled substance violation charge from the Notice to Appear is not disputed. The remaining charges are disputed.

The Court believes that the aggravated felony charge for conviction of a drug trafficking offense is sustained. The Court will rely on the Board's decision in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002). That case stands for the proposition that the Board will be following the precedent of the Federal Circuit Courts of Appeal governing the area where the immigration case is heard. This was done for the purpose of determining whether or not a particular controlled substance conviction should be

considered an aggravated felony. This Court sits in the geographic location of the United States 8th Circuit Court of Appeals. The guiding authority in this circuit is the decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997). That case stands for the proposition that a felony controlled substance violation under state law would invoke treatment as a drug trafficking crime. In respondent's most recent brief, Exhibit 15, counsel acknowledges at page 4 that applying the *Yanez* definition to respondent's case would result in the finding of an aggravated felony for commission of a drug trafficking crime. Though the Court agrees with that, the respondent has been convicted of a felony narcotics offense.

The issue more strongly argued by respondent regarding aggravated felony is whether or not the respondent's conviction should be considered as an aggravated felony because the guilty plea was entered in 1997. The Court believes that the citation in *Yanez* to *Molina* v. *INS*, 981 F.2d 14 (1st Cir. 1992), is the best authority on the issue of whether or not the guidance of *Yanez* should be applied to the respondent's situation. The *Molina* case involved application of a prior Board decision, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), to convictions predating the *Ozkok* decision. The Court believes that in the present case, there is neither actual reliance by the respondent on the state of the law prior to the Board's decision in *Yanez*, nor is there effective reliance in any regard. That lack of reliance by the respondent will be discussed further when I cover his credibility. The Court would note that *Molina* v. *INS* stands for the proposition that retroactive application of agency interpretations developed through adjudication is not automatically unlawful. To the contrary, retroactive application of new principles in adjudicatory proceedings is the rule, not the exception. *See* 981 F.2d. at page 22-23. The Court in *Molina* felt that it was appropriate to apply

the changed Board standards from *Matter of Ozkok* to *Molina*'s pre-*Ozkok* conviction.

The Court would also note that at the time the respondent pled guilty, in July of 1997, the *Briones-Mata* decision of the 8th Circuit had already been published. This decision raised serious issues regarding whether a felony narcotics conviction within the territory of the 8th Circuit would be treated as an aggravated felony. The Court believes there are some strong similarities in this situation to that of the respondent in *Molina* v. *INS*. In effect, the respondent was not in a position where he could comfortably rely on any Board precedent in his favor where the Court of Appeals in his area had come to a significantly different conclusion than the Board did. At a minimum this would certainly limit the extent to which he could actually rely on any prior case law.

The Court believes that the aggravated felony charge in this case is established.

Turning to the other two charges of removability, they essentially relate back to the claim that the respondent was not entitled to SAW status when he was granted that status back in the late 1980's. The Court notes that the burden of proof is on the Service to establish that respondent is removable by evidence that is clear and convincing. *See* Section 240(c)(3)(A) of the Immigration and Nationality Act. The respondent did testify at a prior hearing that his entry into the United States was in May of 1986. He has corrected that testimony today and stated that he entered in late 1985. This is testimony regarding events that took place long ago. The Court realizes at this time that the Service does not have access to the respondent's Special Agricultural Worker file because of confidentiality rules. The respondent has given some more specific testimony today regarding where he worked and the times he worked.

The Court believes it is noteworthy that the respondent apparently has not had access to a FOIA report on his file since the last hearing. Considering that we are talking about events of 16 or more years ago, and the events were subject to prior adjudication by the Service, presumably based on adequate proof at the time, the Court is not eager to remove the respondent's permanent resident status based on what could be a faulty recollection of his date of entry from that long ago. The Court does not believe that the evidence of record at this time meets the clear and convincing standard that is required to sustain the charges of removability set out in Exhibit 14. The Court will not sustain those charges.

The Court will comment briefly on the respondent's credibility regarding the circumstances of his criminal trial. While the Court has given the respondent some latitude regarding testimony about his entry back in 1985, the Court will not grant that same generosity to the respondent regarding his criminal conviction of five years ago. The Court believes that his testimony regarding his discussions with his attorney regarding his immigration status are very vague and very unreliable. The respondent's own testimony is that his attorney did not speak Spanish, and the interpreter for their conversations was not very good. The Court believes it is very instructive that no testimony or affidavits were provided from respondent's criminal attorney regarding the conversations that took place in 1997. The Court does not accept the respondent's testimony that his guilty plea in his criminal case was based on any sort of reliance on statements by his attorney that his immigration status would not be affected. This is patently erroneous information, as the respondent was convicted of a controlled substance violation relating to cocaine, and at a minimum would have been placed in removal proceedings at the time. The Court does not find the respondent's testimony the least bit persuasive regarding any reliance

he had on any alleged statements of his attorney regarding his immigration status.

The Court has found that respondent has been convicted of an aggravated felony. To quality for cancellation of removal for a permanent resident, an applicant must not have been convicted of an aggravated felony. *See* Section 240A(a)(3) of the Immigration Act. Based on the Court's finding that the respondent has been convicted of an aggravated felony, the Court will pretermit and deny the respondent's application for cancellation of removal.

The following orders will be entered in this case:

1. Respondent is found to be removable on the two charges contained in the Notice to Appear.

2. Respondent is not found to be removable on the two charges contained in the Form I-261, Exhibit 14.

3. Respondent's application for cancellation of removal for permanent residents is pretermitted and denied.

4. The respondent is ordered removed from the United States to Mexico.

/s/

JOSEPH R. DIERKES

Immigration Judge

(14)

File
1/24/2006

No. 05-547

In the Supreme Court of the United States

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Immigration and Nationality Act attaches a variety of immigration consequences to an alien's commission of an "aggravated felony," 8 U.S.C. 1101(a)(43). The Act defines "aggravated felony" to include "any felony punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2) (as incorporated into 8 U.S.C. 1101(a)(43)(B)). That term applies to offense conduct "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (final paragraph). The question presented is:

Whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony," where the alien was sentenced under State law to more than one year of imprisonment.

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In the Supreme Court of the United States

No. 05-547

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 417 F.3d 934. The decisions of the Board of Immigration Appeals (Pet. App. 8a-9a) and of the immigration judge (Pet. App. 10a-20a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 9, 2005. The petition for a writ of certiorari was filed on October 31, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), an alien who commits an "aggravated felony," as defined in 8 U.S.C. 1101(a)(43), may be ordered removed

from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). The commission of an aggravated felony also limits the potential forms of relief from removal that are available to the alien, including, as relevant here, rendering the alien ineligible to apply for cancellation of removal, see 8 U.S.C. 1229b(a)(3) and (b)(1)(C).

The INA defines an "aggravated felony" by reference to a lengthy list of criminal offenses, one of which is "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). The term "aggravated felony" applies to such offenses "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (final paragraph).

Section 924(c) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Title 18 more generally defines a "felony" as an offense for which "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559. The Controlled Substances Act also defines "felony" generally as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). The Controlled Substances Act further defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44), as amended by the Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, § 2, 118 Stat. 1663.

2. Petitioner is a native and citizen of Mexico who entered the United States illegally in 1985 or 1986. In 1990, he adjusted his status to that of a lawful permanent resident. Pet. App. 1a-2a, 11a. In 1997, petitioner was indicted in South Dakota state court on one count of possessing cocaine, one count of distributing cocaine, and one count of conspiracy to distribute cocaine. Admin. Rec. (A.R.) 224-227. Petitioner ultimately pleaded guilty to aiding and abetting the possession of a controlled substance (cocaine). Pet. App. 13a; A.R. 399-402. Under South Dakota law at that time, the possession of cocaine was a felony punishable by up to five years of imprisonment. See S.D. Codified Laws §§ 22-42-5 (Michie 1988); *id.* § 22-6-1(7) (Michie 1988 & 1997 Supp.).[1] Also under South Dakota law, a person found guilty of aiding and abetting an offense "is legally accountable[] as a principal to the crime." S.D. Codified Laws § 22-3-3 (West 2004); see S.D. Codified Laws § 22-3-3 (Michie 1988). Petitioner was sentenced to five years of imprisonment, of which he served 15 months. Pet. App. 14a. The Immigration and Naturalization Service subsequently charged petitioner with being subject to removal based on his conviction of a controlled substance violation and his conviction of an aggravated felony. *Id.* at 12a; A.R. 433; see 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i).[2]

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[1] South Dakota law now provides that possession of cocaine is punishable by up to ten years of imprisonment. S.D. Codified Laws §§ 22-42-5, 22-6-1(6) (West 2004).

[2] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

An immigration judge sustained both charges of removability. Pet. App. 10a-20a. The immigration judge ruled first (*id.* at 16a) that petitioner was removable based on the controlled substance violation, a charge that was "not disputed." Relying on controlling precedent from the Board of Immigration Appeals (Board), the immigration judge further ruled that petitioner's state felony controlled substance offense constituted an aggravated felony because it was a drug trafficking crime under 18 U.S.C. 924(c). Pet. App. 16a (citing *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002)). Finally, the immigration judge ruled that petitioner's commission of an aggravated felony statutorily disqualified him from obtaining the discretionary relief of cancellation of removal. Pet. App. 20a (citing 8 U.S.C. 1229b(a)(3)).[3]

The Board affirmed in a brief opinion. Pet. App. 8a-9a.

3. The court of appeals affirmed. Pet. App. 1a-7a. At the outset, the court held (Pet. App. 3a) that the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 310, made clear the court's jurisdiction to review the question of law raised by peti-

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[3] Whether petitioner's conviction for aiding and abetting the possession of cocaine would be punishable as a federal felony is unclear from the face of the record below, because neither the criminal judgment nor the single-count information to which he pleaded guilty indicates what form of cocaine and what amount of cocaine was at issue. See A. R. 399-402; see also 21 U.S.C. 844(a) (generally denominating possession of a controlled substance a misdemeanor, unless, *inter alia*, the substance was more than five grams of cocaine base); 18 U.S.C. 2(a) ("Whoever * * * aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States "is punishable as a principal"). South Dakota officials have informed the Department of Homeland Security that the substance at issue in the case was powder cocaine.

tioner concerning the proper definition of "aggravated felony" under 8 U.S.C. 1101(a)(43). While the INA contains a general prohibition on judicial review of denials of discretionary relief by the Attorney General, see 8 U.S.C. 1252(a)(2)(B), the REAL ID Act excepted questions of law from that jurisdictional bar, see Pub. L. No. 109-13, § 106(a)(1)(A)(iii).

The court of appeals then held (Pet. App. 4a) that petitioner's felony conviction constituted an "aggravated felony." Following its prior decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997) (per curiam), the court held that the "plain language" of Section 1101(a)(43) and the criminal law provisions it incorporates establish tnat "any felony punishable under the Controlled Substances Act," "under either state or federal law," is an aggravated felony. Pet. App. 4a. Because petitioner's conviction was for a felony offense and was for conduct that was independently punishable under the Controlled Substances Act, the court held that it qualified as an "aggravated felony" (Pet. App. 5a), which rendered petitioner ineligible for cancellation of removal (*id.* at 7a). In so holding, the court noted (*id.* at 4a-5a) that its decision accorded with the Fifth Circuit's decision in *United States* v. *Hernandez-Avalos*, 251 F.3d 505, cert. denied, 534 U.S. 935 (2001), but was contrary to the Ninth Circuit's decision in *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905 (9th Cir. 2004).[4]

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[4] The court also rejected (Pet. App. 5a-7a) petitioner's argument that the Board's application of *Yanez-Garcia*, *supra*, was impermissibly retroactive. Petitioner has not sought this Court's review of that aspect of the court of appeals' decision.

DISCUSSION

While the decision of the court of appeals is correct, the courts of appeals are divided on whether a state-law felony drug offense qualifies as an "aggravated felony" if it would be punishable only as a misdemeanor under federal law. That issue is a recurring one that arises in both the immigration context and in the federal criminal sentencing context. The courts of appeals are divided in both the immigration and sentencing areas, with some circuits classifying state-law felonies differently in the two contexts. The proper resolution of the issue has important implications for enforcement of the Nation's immigration and criminal laws, and thus merits this Court's review. This case appears to be an appropriate vehicle for resolution of that question.[5]

1. a. *Immigration Context.* The courts of appeals have issued conflicting rulings on whether an "aggra-

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[5] The Department of Homeland Security has informed this Office that, on January 4, 2006, petitioner was removed, at his own request, to Mexico. That development does not moot the case or otherwise legally diminish the parties' interest in this Court's resolution of the question presented. The determination that petitioner committed an aggravated felony in this case barred him from pursuing his application for cancellation of removal. Pet. App. 3a-4a, 7a; 8 U.S.C. 1229b(a). Because, to the government's knowledge, petitioner has not been convicted of any other criminal offense, were this Court to decide that his cocaine conviction is not an aggravated felony, the Board would address petitioner's request for cancellation of removal, which is a form of relief that petitioner can continue to pursue in administrative proceedings even while he is in Mexico. Were the Attorney General to exercise his discretion to cancel the removal, petitioner would then be permitted to return to the United States. Cf. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983). In addition, a determination that petitioner is not an aggravated felon would lift the statutory restriction on his readmission to the United States, 8 U.S.C. 1182(a)(9)(A)(i) and (ii).

vated felony" under the INA, 8 U.S.C. 1101(a)(43), includes a state-law felony conviction for a drug offense that would be punishable only as a misdemeanor under the relevant federal controlled substances law. The Fifth Circuit, like the court of appeals here, Pet. App. 4a, has held that a state-law felony conviction constitutes an "aggravated felony" as long as the offense conduct would be punishable—either as a felony or a misdemeanor—under the statutorily designated federal controlled substances laws (*i.e.*, the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, the Controlled Substances Import and Export Act, 21 U.S.C. 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901 *et seq.*). See *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir.), cert. denied, 534 U.S. 935 (2001); see also *Salazar-Regino* v. *Trominski*, 415 F.3d 436, 448 (5th Cir. 2005), petition for cert. pending, No. 05-830 (filed Dec. 22, 2005).

The Second, Third, and Ninth Circuits, by contrast, have held in immigration cases that a state-law offense will qualify as an "aggravated felony" only if the offense would also be punishable as a felony under federal law. See *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910-918 (9th Cir. 2004); *Gerbier* v. *Holmes*, 280 F.3d 297, 307-316 (3d Cir. 2002); *Aguirre* v. *INS*, 79 F.3d 315, 317-318 (2d Cir. 1996). The issue is currently pending in the Seventh and Tenth Circuits. See *Gonzales-Gomez* v. *Achim*, No. 05-2728 (7th Cir.) (argued Jan. 4, 2006); *Gonzalez-Gonzalez* v. *Weber*, No. 04-1181 (10th Cir.) (argued March 8, 2005).

b. *Criminal Sentencing Context.* The Sentencing Guidelines adopt the INA's definition of "aggravated felony" for purposes of authorizing an eight-level adjustment in the advisory sentencing range for illegal reentry

convictions. See Sentencing Guidelines § 2L1.2(b)(1)(C) and comment.(n.3(A)); see also 8 U.S.C. 1326(b)(2) (authorizing a sentence of up to 20 years for reentry by an alien whose prior removal "was subsequent to a conviction for commission of an aggravated felony"). In construing the phrase "aggravated felony" in 8 U.S.C. 1101(a)(43)(B) in the sentencing context, the courts of appeals have recently come into conflict.

Almost every court of appeals to consider the question in a sentencing case has held that state-law controlled substance felonies constitute aggravated felonies even if punishable only as a misdemeanor under federal law. See *United States* v. *Wilson*, 316 F.3d 506, 512-514 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-148 (2d Cir.), cert. denied, 528 U.S. 880 (1999); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir.), cert. denied, 528 U.S. 844 (1999); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997); *United States* v. *Briones-Mata*, 116 F.3d 308, 309-310 (8th Cir. 1997) (per curiam); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000-1001 (10th Cir.), cert. denied, 519 U.S. 885 (1996); *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364-366 (1st Cir. 1996). The Ninth Circuit likewise has held that a state-law drug felony is sufficient, *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1339-1340 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001), at least where the maximum punishment authorized by state law exceeds one year of imprisonment, *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904-905 (9th Cir. 2002). See also *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 58 (1st Cir. 2004) (same as *Robles*).

The Sixth Circuit, however, recently held in the sentencing context that the state-law offense must also be

punishable as a felony under federal law before it will constitute an aggravated felony. See *United States* v. *Palacios-Suarez*, 418 F.3d 692, 697-700 (6th Cir. 2005). But that court has indicated that, even if the offense conduct ordinarily would be punishable only as a misdemeanor under federal law, the state offense will still qualify as an aggravated felony if the defendant's recidivist history would have rendered him eligible for a felony sentence had he been prosecuted under federal law. *Id.* at 700. See also *United States* v. *Simpson*, 319 F.3d 81, 85-86 & n.6 (2d Cir. 2002) (same); *United States* v. *Haggerty*, 85 F.3d 403, 406 (8th Cir. 1996) (same); *United States* v. *Forbes*, 16 F.3d 1294, 1301 (1st Cir. 1994) (same).

The fact that the Second and Ninth Circuits have adopted different readings of the same statutory language in 8 U.S.C. 1101(a)(43)(B), depending on whether that immigration law provision is implicated in an immigration case or a sentencing case, further compounds the confusion. Compare *Cazarez-Gutierrez*, *supra*, and *Aguirre*, *supra*, with *Ibarra-Galindo*, *supra*, and *Pornes-Garcia*, *supra*; contrast *Palacios-Suarez*, 418 F.3d at 697 (refusing to adopt differing constructions of the statutory text for immigration and sentencing cases); *Hernandez-Avalos*, 251 F.3d at 509 (same); cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (courts "must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context").

Accordingly, the question presented has been broadly considered by the courts of appeals and the conflict is entrenched and multi-dimensional. Further consideration of the question by other courts of appeals will simply exacerbate, rather than ameliorate, the conflict.

An exercise of this Court's certiorari jurisdiction to resolve the question is warranted.

2. The question of when state felony drug offenses constitute aggravated felonies under the INA is a frequently recurring issue of significant importance. The Department of Homeland Security has informed this Office that, in Fiscal Year 2005, more than 77,000 aliens with criminal records were ordered removed from the United States, and that approximately 9.5% of those aliens had arrests for drug possession offenses. While it is difficult to calculate precisely how many of those removals turned upon denominating the crime an "aggravated felony," because statistics are not kept at that level of detail, the large number of removals that arise annually involving aliens convicted of controlled substance offenses confirms what the case law and the federal government's experience in administering the immigration laws indicate: the characterization of a state controlled substance felony as an aggravated felony is a frequently recurring issue, and continued confusion about the proper interpretation of that term consumes significant governmental and private resources and complicates and delays the proper enforcement of the immigration laws.

Indeed, the lack of uniformity in circuit precedent has prompted the Board of Immigration Appeals to eschew administration of a consistent definition of "aggravated felony" in immigration cases. Initially, in *In re K-V-D-*, 22 I. & N. Dec. 1163 (1999), the Board held that a state felony drug possession conviction would qualify as an aggravated felony only if it also was punishable as a felony under the applicable federal drug laws. But, because it came to recognize "[t]he analytical difficulties inherent in the hypothetical felony approach," and be-

cause contrary federal circuit rulings had overriden the Board's *K-V-D-* decision in a number of circuits, the Board subsequently abandoned *K-V-D-* as precedent. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 393 (BIA 2002). The Board held in *Yanez-Garcia*, instead, that it would follow the rule adopted by the circuit court of appeals in which the immigration case arose concerning when a state drug offense qualifies as an aggravated felony. *Id.* at 393-398. In the circuits that had not decided the issue, the Board determined that it would apply the rule that a state felony possession offense is an aggravated felony as long as it is punishable under federal law as either a felony or a misdemeanor, because that approach "bears considerable logical force and flows coherently and intuitively from the relevant statutory language," while avoiding the "often-convoluted hypothetical analysis that can be difficult to apply in practice," *id.* at 397-398. Granting the petition in this case thus would promote stability and a consistent approach to the definition of aggravated felony in immigration cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2006

No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, IMMIGRANT LEGAL RESOURCE CENTER AND IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION

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INTERESTS OF AMICI CURIAE[1]

This case manifests the wide and growing splits among the courts of appeals over the proper application of the "aggravated felony" drug trafficking definition to state simple possession drug offenses. As organizations that advise immigrants and train defense lawyers and judges on the immigration and criminal consequences of a conviction for drug possession, amici urge the Court to grant certiorari in this case so that this important question may be resolved and immigrants may make knowing and intelligent choices during their criminal proceedings.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **National Legal Aid and Defender Association** (NLADA), a non-profit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to pro-

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amici state that no counsel for a party authored any part of the brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

moting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including non-profit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members. NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national non-profit membership association that devotes its resources exclusively to serving the equal justice community. NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed amicus curiae briefs in major constitutional cases before the United States Supreme Court and other federal and state courts involving the administration of the criminal justice system and the right to counsel.

The **National Association of Federal Defenders** (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. Attorneys in the NAFD have been appointed by the federal courts to represent thousands of indigent defendants accused of violating 8 U.S.C. § 1326, illegal reentry into the United States following deportation. Because the penalty faced by these defendants increases dramatically if the deportation occurred after a prior conviction for an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43), the NAFD has a strong interest in the proper interpretation of the aggravated felony definition.

The **Capital Area Immigrants' Rights Coalition** (CAIR Coalition) is an association of legal groups, advocacy groups, and social service providers serving the immigrant community in the Washington D.C. metropolitan area. The CAIR Coalition acts as the primary source of representation for detained immigrants in the region - including those immigrants with criminal matters that may be affected by the diverse interpretations of the "aggravated felony" provision that the petition for certiorari in this case seeks to resolve. Because of the CAIR Coalition's belief in the inherent worth and dignity of immigrants, the CAIR Coalition is committed to a country where immigration laws and policy are fair, humane, just, and accord due process of law. The CAIR Coalition was formed in 1987 as the D.C. Community Coalition, first under the auspices of the Lawyers' Committee for Civil Rights and Urban Affairs and then from 1998-1999 as a division of the Catholic Legal Immigration Network, Inc. Since January 1, 2000, the CAIR Coalition has operated as an independent non-profit organization.

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1,400 public defenders, legal aid attorneys, assigned counsel and others dedicated to developing and supporting high quality legal defense services for all people, regardless of income. Among other initiatives, NYSDA operates the **Immigrant Defense Project** (IDP), which provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications and training on issues involving the interplay between criminal and immigration law.

SUMMARY OF ARGUMENT

There are clear and growing splits among the circuit courts of appeals concerning the proper approach to determine whether a state simple possession drug offense may be deemed an aggravated felony as "illicit trafficking in a controlled substance." The circuits are sharply divided over whether a state drug offense may be considered an aggravated felony simply because it is a felony under state law without considering whether the offense would be a felony under federal law. Some circuits, but not others, would even apply the aggravated felony label to a state misdemeanor simple possession drug offense. Circuits are also divided over whether to apply the same or different tests in the immigration and criminal sentencing contexts. These circuit splits cry out for resolution by the Supreme Court, and for more careful consideration of differences in state and federal treatment of simple possession offenses and whether Congress intended for the drug trafficking category to include state simple possession offenses.

An award of certiorari is also appropriate in light of the importance of the underlying issues in these cases. In the immigration context, application of the aggravated felony label subjects a non-citizen to the harshest penalties in the immigration law. Virtually all non-citizens, including lawful permanent residents, are deportable if they have been convicted of a drug-related offense. When that drug offense is labeled an "aggravated felony," however, immigration judges are barred from granting asylum and other basic forms of relief from removal, no matter how harmful removal may be for the non-citizen or his family. This is true even for lawful permanent residents who have spent most of their lives in the United States, asylum seekers who have suffered or reasonably fear persecution in their home countries, members of the U.S. Armed Forces, and immigrants with U.S. citizen spouses and children.

In the sentencing context, application of the aggravated felony label vastly increases the consequences of a past conviction for a person who illegally re-enters the United States to a maximum penalty of twenty years in prison.

Given the severe penalties that follow application of the federal aggravated felony "illicit trafficking" label to state simple possession drug offenses, the Court should now resolve the uncertainty that has resulted from the circuit courts' multitude of interpretations. The proliferation of conflicting interpretations of the term undermines the rule of law. Because immigration judges apply the law of the circuit in which they sit, and because the Department of Homeland Security (DHS) routinely transfers detainees from one location to another, it is virtually impossible for an immigrant to know, and for counsel to advise effectively on, the possible future consequences of a state simple possession drug conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE WIDE CIRCUIT SPLITS CONCERNING APPLICATION OF THE AGGRAVATED FELONY ILLICIT DRUG TRAFFICKING LABEL TO STATE SIMPLE POSSESSION OFFENSES

This case presents the question whether and when a state drug conviction for simple possession falls within the federal aggravated felony category of "illicit trafficking in a controlled substance." In this case, the Eighth Circuit Court of Appeals found that a single state drug possession conviction must be treated as a drug trafficking aggravated felony simply because the state classifies the crime as a felony, even though the offense would have been a misdemeanor under federal law. The courts of appeals are sharply divided on whether this is the correct interpretation of the drug trafficking category. Indeed, splits exist on this issue even within some circuits that have applied different interpretations of the term in immigration and criminal sentencing contexts.[2] By taking this case, the Court can resolve these conflicts.[3]

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[2] The Second and Ninth Circuits have expressly held that different rules apply in aggravated felony determinations in immigration proceedings, and in criminal sentencing cases involving sentence enhancements for the federal crime of illegal re-entry based on prior conviction of an aggravated felony. *See United States v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999); *Cazarez-Gutierrez v.*

Amici submit that the Eighth Circuit's approach in this case ignores the gap between how South Dakota - the state that convicted Mr. Lopez - and the federal government choose which drug possession offenses to classify as felonies. Federal law classifies virtually all first-time drug possession offenses as misdemeanors. *See* 21 U.S.C. § 844(a). In contrast, South Dakota law classifies virtually all possession offenses as felonies. *See generally* S.D. Codified Laws §§ 22-42-5 & 22-42-6 (2006) (penalties for possession of controlled substance and for possession of marijuana). An award of certiorari in this case will permit the Court to assess the relevance of such gaps between state and federal law in the treatment of different drug offenses, and this analysis may inform whether it was appropriate for the Eighth Circuit to have relied solely on the state's classification of the offense to determine

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Ashcroft, 382 F.3d 905 (9th Cir. 2004). The Fifth and Sixth Circuits have held that the term has the same meaning in both contexts. *See United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001); *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005). Meanwhile, the Board of Immigration Appeals has held that it will apply the law of the circuit whether or not it arose in the immigration or sentencing context, and presumably will apply the law of the circuit as to whether the rule may be different in immigration as opposed to criminal cases. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002). Resolution of this issue is important because the splits between immigration and criminal sentencing cases are in tension with the long-standing principle that the court should interpret the use of a term in one context consistently with its interpretation applying any appropriate rule of statutory construction invoked in another context. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) for "applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications")).

[3] For a complete summary of the circuit splits on this issue, *see* Petition for a Writ of Certiorari at 7-13, *Lopez v. Gonzales*, No. 05-547 (filed Oct. 31, 2005). Amici note that there are at least three other petitions for certiorari also raising these circuit splits now pending before the Supreme Court. *See Salazar-Regino v. Moore*, No. 05-830 (petition for cert. filed Dec. 22, 2005) (immigration case); *Toledo-Flores v. United States*, No. 05-7664 (petition for cert. filed Nov. 15, 2005) (criminal sentencing case); *Mendoza-Torres v. United States*, No. 05-7496 (petition for cert. filed Nov. 9, 2005) (criminal sentencing case).

whether it should be deemed an "illicit trafficking" aggravated felony.

In finding a simple possession drug offense to be a "drug trafficking crime," the Eighth Circuit's approach also failed to consider the ordinary meaning of that term, in contravention of the Court's recent decision in *Leocal*, 543 U.S. 1. In *Leocal*, the Court unanimously affirmed the principle that statutory terms should be construed according to their "ordinary or natural meaning." 543 U.S. at 11-12 (finding that, in construing the "crime of violence" term referenced in the aggravated felony definition, one should consider the "ordinary meaning" of the term in addition to the definitional language).

By granting certiorari in this case, the Court will be able to address and resolve these important questions about what is the proper application of the aggravated felony "illicit trafficking" drug category to state simple possession drug convictions.

II. THE CIRCUIT SPLITS CONCERN APPLICATION OF THE SEVEREST PENALTIES IN BOTH THE IMMIGRATION AND CRIMINAL SENTENCING CONTEXTS

Non-citizens such as Mr. Lopez whose simple possession drug offenses are deemed "illicit trafficking" aggravated felonies suffer dramatically severe consequences in both the immigration and criminal sentencing contexts.

In the immigration context, Mr. Lopez and virtually any other non-citizen convicted of a drug offense is deportable.[4] Congress has chosen to mitigate the dramatic impact of this law by allowing immigration judges to find certain non-citizens eligible for depor-

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[4] *See* 8 U.S.C. § 1227(a)(2)(B), which provides:

> Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

tation relief. For example, immigration judges may grant asylum, cancellation of removal, or other relief from removal if non-citizens prove a threat of persecution upon removal or other sufficiently positive equities, such as long residence in the country, extensive family ties, evidence of rehabilitation, or extreme hardship. The aggravated felony determination, however, acts as a *per se* bar to these forms of relief, preventing immigration judges from granting relief even for those non-citizens whose continued presence here would benefit the United States. In addition, a lawful permanent resident, despite praiseworthy life accomplishments in the United States, is rendered forever ineligible for naturalization as a U.S. citizen.

In the context of the federal criminal sentence enhancement for the crime of illegal re-entry after removal, federal law subjects an individual with a drug possession conviction to a potentially vast sentence enhancement if that conviction is deemed an aggravated felony. Absent classification of a past conviction as an aggravated felony, the act of illegal re-entry subsequent to conviction of a simple possession drug offense carries a maximum penalty of two years in the case of an offense classified by the state as a misdemeanor, and ten years in the case of an offense classified as a felony. But when such a past simple possession drug offense is deemed by the federal government to be a drug trafficking aggravated felony, the person who has re-entered is subject to a maximum penalty of twenty years.

Despite these profoundly life-altering consequences of being deemed an aggravated felon, courts are currently adjudicating this critical determination inconsistently throughout the country as a function of the circuit splits.

A. In the Immigration Context, an Aggravated Felony Conviction Bars an Immigration Judge from Granting Asylum to a Non-Citizen Seeking Refuge from Persecution or from Waiving the Removal of a Long-Time Lawful Permanent Resident Who Demonstrates Favorable Factors, and Permanently Bars Naturalization

Because Congress has long recognized that removal has dramatic and devastating consequences for non-citizens and their families, the Immigration and Nationality Act contains several provisions that empower judges to grant relief from removal to otherwise deportable or inadmissible non-citizens based on their individual circumstances. Non-citizens with simple possession drug convictions, including lawful permanent residents who have lived in the United States for many years, will be ineligible for almost all of these forms of relief if they appear before an immigration judge in a jurisdiction where their offense is considered an aggravated felony.

For example, individuals who have suffered past persecution or who face a well-founded fear of future persecution in their home countries are eligible for asylum in the United States. For immigrants who cannot return to their countries of origin, asylum is a route to permanent residency and eventually U.S. citizenship. Immigrants who have been convicted of a "particularly serious crime," however, are statutorily barred from eligibility for asylum, and such forms of relief may even be revoked based on their convictions. *See* 8 U.S.C. §1158(b)(2)(A)(ii) & (c)(2)(B). An individual convicted of an "aggravated felony" is automatically deemed to have been convicted of a "particularly serious crime," *see* 8 U.S.C. §1158(b)(2)(B)(i), and therefore is statutorily barred from obtaining asylum or subject to termination of asylum. An immigration judge presiding over such a case lacks any discretion to grant or continue asylum, regardless of how great the danger of persecution the non-citizen would face if returned to her home country.

In addition, non-citizens who, like Mr. Lopez, have been granted lawful permanent resident status but who become deport-

able may be eligible for cancellation of removal if they have been lawfully admitted as permanent residents for at least five years and have spent seven continuous years in the United States. 8 U.S.C. § 1229b(a). Receipt of cancellation of removal depends upon the non-citizen's ability to show positive equities that outweigh the crime. Cancellation of removal has traditionally been an important form of relief for lawful permanent residents who have lived in the United States for most of their lives and lack meaningful ties to their home country, who have served in the U.S. Armed Forces, whose families would suffer if they were deported, or who can show proof of rehabilitation and good character. If they have been convicted of an offense deemed to be an aggravated felony, however, lawful permanent residents are statutorily barred from obtaining cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3) & (b)(1)(C). Application of the aggravated felony label to a simple possession drug offense therefore prohibits an immigration judge from considering even the most compelling individual circumstances and requires the removal of individuals who would otherwise qualify for the relief that Congress has made available.[5]

Finally, in order to naturalize and become a U.S. citizen, a non-citizen ordinarily must establish, among other things, that she has been a person of "good moral character" for five years, and that she has continued to exhibit good moral character while the naturalization application is pending. *See* 8 U.S.C. § 1427(a). In contrast, a non-citizen convicted of an aggravated felony after 1990 is permanently barred from naturalization because the Immigration and Nationality Act precludes any such individual from establishing good moral character. *See* 8 U.S.C. § 1101(f)(8).

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[5] A non-citizen with an aggravated felony conviction is also ineligible for voluntary departure in lieu of an order of removal. *See* 8 U.S.C. § 1229c(b)(1)(C). This form of relief allows a non-citizen to avoid the stigma and harassment of deportation, and permits her to leave within a designated period of time and at her own cost, giving her an opportunity to tie up her affairs in the United States before departure. Voluntary departure also allows a non-citizen to choose to return to a country other than her country of origin in order to avoid persecution.

B. In the Criminal Sentencing Context, an Aggravated Felony Conviction Increases the Maximum Penalty for Illegal Re-Entry to 20 Years Imprisonment

When convicted of the crime of re-entry into the United States after removal, a non-citizen is normally subject to a prison sentence of no more than two years. *See* 8 U.S.C. § 1326(a). If the individual's prior removal is found to be subsequent to conviction of "three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)," the maximum possible punishment increases to ten years. *See* 8 U.S.C. § 1326(b)(1). If, however, the individual's prior removal is found to be subsequent to a conviction of an aggravated felony, the maximum sentence increases to twenty years. *See* 8 U.S.C. § 1326(b)(2). This means that an individual who was convicted of a simple possession misdemeanor drug offense is subject to an increase in sentence maximum from two years to twenty years, and an individual who was convicted of a simple possession felony offense is subject to an increase in maximum sentence from ten years to twenty years, if the offense is deemed by the federal government to be a drug trafficking "aggravated felony."

III. THE CIRCUIT SPLITS UNDERMINE THE RULE OF LAW BY INTERFERING WITH IMMIGRANTS' ABILITY TO MAKE DECISIONS CONCERNING THE RESOLUTION OR LATER IMPACT OF CRIMINAL CHARGES THAT MAY HAVE PROFOUND IMMIGRATION CONSEQUENCES

As a result of the circuit splits we describe above, a non-citizen charged with a simple possession drug offense in criminal proceedings cannot know whether her offense will later be deemed an aggravated felony. She therefore is unable to know whether she might obtain any relief from removal, no matter how compelling her circumstances or whether she might be subject to a dramatically increased prison sentence for the offense of being found in the United States subsequent to removal. In fact, due to the circuit splits and the happenstance of where the government later chooses to detain an individual, two non-citizens convicted of the same

crime in the same state may face dramatically different immigration and criminal sentencing consequences.

Amici are organizations that are comprised of or serve defense attorneys whose clients could face removal and other severe immigration and criminal consequences as a result of a criminal disposition by guilty plea or trial conviction. In order to counsel immigrant clients properly about the relative advantages and disadvantages of taking a plea, criminal defense attorneys must be fully informed about the implications that a conviction may have for the non-citizen's immigration status. Amici's mission includes training attorneys to give sound legal advice to their clients, including non-citizen clients.

The circuit splits make it very difficult for amici to carry out this task because it is virtually impossible to predict where non-citizens will face removal proceedings. DHS detains non-citizens convicted of simple possession drug offenses, *see* 8 U.S.C. § 1226(c)(1)(B), and may detain them in any detention facility in the country, including in a circuit other than the ones in which their criminal proceedings took place or in which they reside. Furthermore, DHS may detain a non-citizen U.S. resident upon her attempted return to the United States after a trip abroad, if she is found inadmissible as a result of a prior conviction. A non-citizen may also be detained due to a prior conviction if she comes to the attention of DHS through an application for a new immigration status, such as naturalization. Lastly, non-citizens seeking asylum in the United States may be subject to detention while their asylum applications are processed. The non-citizen's immigration proceedings may therefore take place in the circuit of detention, the circuit of return to the United States, or the circuit of application for a new immigration status, and be governed by that circuit's case law even if it is a different circuit from the one in which the non-citizen's criminal proceedings occurred.

The circuit splits therefore result in far more than the obvious effect of subjecting an individual with a simple possession drug conviction in one circuit to unfavorable immigration and criminal sentencing consequences while another individual with a similar conviction in another circuit is not so subject; it also has the effect of preventing their knowing what circuit law will later govern their

immigration or sentencing case. The Board of Immigration Appeals has held that in determining whether a drug conviction constitutes an aggravated felony, immigration judges must defer to the interpretation given to the phrase "illicit trafficking in a controlled substance" by the circuit in which they sit.[6] Given the current circuit splits, DHS' practice of detaining non-citizens in facilities throughout the country, without regard to the state in which they reside or the state in which the conviction occurred, means that any circuit's rule may apply to any one individual.

Non-citizens placed in detention in New York, for example, are commonly transferred to county jails in New Jersey (with hearings before immigration judges in New York City, in the Second Circuit, or Newark, in the Third Circuit), York, Pennsylvania (Third Circuit), or Oakdale, Louisiana (Fifth Circuit). Each of these Circuits applies a different rule regarding whether and under what circumstances a state simple possession drug conviction may constitute an aggravated felony. As a result, a New York resident will face vastly different immigration consequences depending solely upon where the government chooses to detain her. A long-time lawful permanent resident with U.S. citizen children who has a New York simple possession drug conviction, if detained in Louisiana, may be deemed to have been convicted of an aggravated felony and denied any possibility of relief from removal. The same person convicted of the same simple possession offense, if detained in Pennsylvania, will be eligible for cancellation of removal, permitting her a chance to remain in the United States to care for her children.

Furthermore, individuals are commonly detained in several different circuits during the course of the removal process. A typical scenario involves a New York resident, convicted in New York and arrested by immigration officials at the probation office, transferred to a county jail in New Jersey, where he may or may not see an immigration judge for a bond hearing, and finally transferred to Oakdale. Family members in New York are likely to contact New York attorneys and advocates on his behalf, while the non-citizen

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[6] *In re Yanez-Garcia*, 23 I. & N. Dec. at 396.

himself may speak with an attorney in New Jersey before proceedings finally commence in Louisiana. Due to the circuit splits, any legal advice he or his family receives becomes useless as soon as he is transferred to a facility in another circuit.

As detention plays a growing role in immigration enforcement, the lack of predictability within the law becomes increasingly troubling. The numbers of non-citizens detained through these different routes has risen steadily in the past ten years. From 1996 to 2004, the size of the daily population in DHS detention facilities increased by more than 150%, from 9,011 in 1996 to 22,812 in 2004.[7] Over the course of a given year, hundreds of thousands of non-citizens will be detained. In 2002, DHS detained approximately 202,000 non-citizens. Of this number, DHS asserts approximately 103,000 had criminal records.[8]

As a result of the circuit splits, then, thousands of non-citizens are unable to predict the devastating immigration consequences that could follow from a simple possession drug conviction, because those consequences depend entirely on where the non-citizen is detained. This is especially so in a criminal court system where attorneys serving indigent defendants, the prosecutors who try their cases, and the judges who hear them all carry massive caseloads. This over-burdened system usually depends on all but a handful of cases being disposed of through plea bargains. Advocates may have only minutes to talk to their clients before a hearing at which a plea can be taken; it is essential for attorneys to have clear rules to govern the advice they provide, especially when

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[7] Alison Siskin, Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues*, CRS Report RL32369, 12 (2004), *available at* http://www.fas.org/irp/crs/RL32369.pdf. DHS' Bureau of Immigration and Customs Enforcement (ICE) operates eight detention facilities around the country, and augments the capacity of its own detention facilities with an additional seven contract detention facilities. ICE also uses state and local jails on a reimbursable basis, joint federal facilities with the Bureau of Prisons, the Federal Detention Center in Oakdale, Louisiana, and a contractor owned and operated facility in Eloy, Arizona. U.S. ICE Office of Detention and Removal (DRO), http://www.ice.gov/graphics/dro/ (last visited Dec. 22, 2005).

[8] Siskin, *supra* note 7, at 12.

the potential immigration consequences far outweigh the penal consequences.

The experience of amicus IDP illustrates how the current circuit splits interfere with efforts to provide sound legal advice to immigrants facing pending criminal charges in the criminal justice system. IDP's mission includes providing information to immigrant defendants and their attorneys to assist them in making decisions during their criminal proceedings that may have drastic immigration consequences. IDP runs a hotline that receives more than 1,000 calls per year from immigrants and advocates. Many of these calls involve questions about the potential immigration consequences of a guilty plea in simple possession drug cases. Given the current circuit splits in interpreting the term, however, it is virtually impossible to advise such callers, because neither IDP nor the defendant can predict what law will apply in any subsequent immigration case.

Moreover, amici also serve non-citizens with past convictions, many of which are decades old. These individuals seek advice regarding a host of immigration-related decisions. For example, they often seek advice about whether or not to file for naturalization, whether or not to leave the country on business trips or to visit family, and whether or not to apply for a replacement green card. A lawful permanent resident with U.S. citizen children and a U.S. citizen spouse may seek advice about whether or not she should leave the country in order to visit a dying parent. If she has a past simple possession drug conviction, she could be deemed inadmissible upon her return. If placed in detention upon her attempted return to the United States, she might be transferred to any detention facility in the country, and it is virtually impossible to know whether her drug possession conviction will render her ineligible for the discretionary relief from removal that her compelling circumstances might otherwise afford her.

In sum, the circuit splits, coupled with DHS detention transfer policies, make it extremely difficult to predict what consequences will follow from a guilty plea or a decision to go to trial. As a result of the splits, a non-citizen convicted of a simple possession drug offense may be subject to drastically different consequences depending solely upon where she is detained. A stable and uni-

form definition of the "aggravated felony" drug trafficking term is necessary for defense attorneys and immigrant advocates to advise immigrants who are making decisions that could have life-altering consequences for themselves and their families. Without uniformity in the interpretation of the term "aggravated felony," stability and predictability within the legal system become elusive concepts to non-citizens struggling to make informed choices during and after their criminal proceedings.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the petition for the writ of certiorari should be granted.

JANUARY 2006

Respectfully submitted,

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Supreme Court, U.S.
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No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner Jose Antonio Lopez submits this supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Seventh Circuit in *Gonzales-Gomez* v. *Achim*, No. 05-2728, 2006 U.S. App. LEXIS 7066 (7th Cir. March 22, 2006).

Judge Posner's opinion for the Seventh Circuit in *Gonzales-Gomez* conflicts with the Eighth Circuit's decision in this case on the precise question presented for review. The Seventh Circuit thus joins the Second, Third, Sixth, and Ninth Circuits, which have all held that a state-law felony that would be punishable only as a misdemeanor under federal law is not an "aggravated felony" for purposes of federal immigration law. *See* Pet. 9-12.

Gonzales-Gomez, like Petitioner, was a lawful permanent resident of the United States who was convicted of a drug possession charge. *Gonzales-Gomez*, slip op. at 1. Gonzales-Gomez's conviction was a felony under Illinois law, but the conduct charged amounted only to a misdemeanor under the federal Controlled Substances Act. *Id.* Like Petitioner, Gonzales-Gomez applied for cancellation of removal, but was denied when the Immigration Judge and the Board of Immigration Appeals held that his state-law drug possession felony constituted a federal "aggravated felony." *Id.* at 1-2. The Seventh Circuit disagreed. The court granted Gonzales-Gomez's petition for review, holding that a state-law drug possession felony is not an "aggravated felony" for purposes of the immigration law. *Id.* at 7.

The court held that the government's contrary position "is a strained reading of the statutory language, is inconsistent with the government's general position regarding the definition of 'aggravated felony,' is inconsistent with the interest in uniform standards for

removal, and is inconsistent with the legislative history." *Id.* at 2.

The court traced the statutory cross-references defining "aggravated felony" in the immigration context and held that "[t]he implication of this chain of incorporations is that if you commit a *felony violation of the Controlled Substances Act* you are guilty not just of an ordinary felony, but of an 'aggravated felony.'" *Id.* at 3 (emphasis added).

The court rejected the government's position that a state-law drug felony is "punishable under the Controlled Substances Act," and noted that the legislative history of 18 U.S.C. § 924(c) contained "no hint that commission of a state drug offense is now to be deemed the commission of a federal drug offense." *Id.* at 4. The court also rejected the government's argument that "it is too difficult for the immigration authorities or the courts to determine whether conduct that resulted in a state felony conviction would also have been a felony under the Controlled Substances Act": 'So long as the quantity is known, there is rarely any mystery about whether the defendant committed a felony violation of the Act." *Id.* at 4-5.

Finally, the court noted the negative implications of the position advanced by the government: "Allowing cancellation of removal to depend on how severely a particular state punishes drug crimes would have the paradoxical result of allowing states, in effect, to impose banishment from the United States as a sanction for a violation of state law. For then if a state made the possession of one marijuana cigarette a felony, which it is perfectly entitled to do, it would be in effect annexing banishment from the United States to the criminal sanction. States do not have the power to banish people from the United States." *Id.* at 5. While "Congress could permit [grounds for allowing aliens to remain in the United States] to vary from state to state, . . . it would be unlikely to do so (and it has not done so)." *Id.* at 6.

The Seventh Circuit's opinion in *Gonzales-Gomez* further exacerbates the circuit split identified in the petition for certiorari. As the government agreed in its acquiescence to certiorari, "the question presented has been broadly considered by the courts of appeals and the conflict is entrenched and multi-dimensional." Resp. Br. 9. The Seventh Circuit's opinion validates Respondent's prediction that "[f]urther consideration of the question by other courts of appeals will simply exacerbate, rather than ameliorate, the conflict." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

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(13)

No. 05-547

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Certiorari Granted April 3, 2006.

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United States Court of Appeals for the Eighth Circuit Docket Entries

04-2397 Jose Antonio Lopez v. John Ashcroft

Court of Appeals Docket #: 04-2397
Filed: 6/10/04
Jose Antonio Lopez v. John Ashcroft
Appeal from: Immigration & Naturalization Service

Lower court information:

District: 0090-1 : A91-726-777
Date Filed: **/**/**
Date order/judgment: 5/11/04
Date NOA filed: **/**/**

Fee status: paid

Current cases: None

6/10/04	Agency Case Docketed (jab)
6/10/04	PETITION for Review of an order of the INS, Board of Immigration Appeals [1776142] [04-2397] (jab)
6/10/04	BRIEFING SCHEDULE: Certified List due on 7/20/04 Appendix due on 8/3/04 , Opening brief due on 8/3/04 , responsive brief due on 9/2/04 , Reply brief due on 9/16/04 , (jab)
6/21/04	APPEARANCE for respondent, attorney Emily Anne Radford & Keith Bernstein [04-2397] [1779642] (skh)

7/23/04	MOTION of respondent, John Ashcroft , for extension of time to file administrative record until 9/20/04 . [04-2397] [1791976] w/service 7/23/04 (jpp)
7/26/04	ORDER filed:granting respondent motion extension of time to file administrative record. [1791976-1] [04-2397] [1791977] Certified list due on 9/20/04 , Appendix due on 10/4/04, Opening brief due on 10/4/04 , Responsive brief due on 11/3/04 . Reply brief due on 11/17/04 . (jpp)
9/16/04	MOTION of respondent, John Ashcroft , for extension of time to file record until 11/4/04 . [04-2397] [1812795] w/service 9/16/04 (skh)
9/20/04	ORDER filed:granting respondent motion extension of time to file record. [1812795-1] [04-2397] [1812796] Administrative Record/Tr. due on 11/4/04 . Opening brief & Appendix due on 11/18/04; Responsive brief due on 12/20/04. Reply brief due on 1/3/05 . (skh)
10/18/04	RECORDS received: Administrative Record consisting of 1 Volumes 1 copies [04-2397] (skh)
11/18/04	BRIEF FILED - Brief of Petitioner - Jose Antonio Lopez. 14 pages; w/addendum - 10 copies - w/service 11/16/04. w/diskette [04-2397] [1836542] (skh)
11/18/04	RECORDS received: Appendix filed by Petitioner Jose Antonio Lopez consisting of 1 Volume(s), 3 Copies. [04-2397] (skh)
12/27/04	APPEARANCE for respondent, attorney Russell J.E. Verby and David V. Bernal [04-2397] [1849423] (skh)

12/27/04	BRIEF FILED - Brief of Respondent - John Ashcroft. 3,626 Words; 10 copies - w/service 12/20/04. w/diskette [04-2397] [1849426] (skh)
1/3/05	MOTION of petitioner, Jose Antonio Lopez , for extension of time to file reply brief until 1/24/05. [04-2397] [1851447] w/service 1/3/05 (skh)
1/4/05	TO SCREENING to rw. [04-2397] (bwb)
1/5/05	ORDER filed: granting petitioner motion extension of time to file reply brief. [1851447-1] [1851450] Reply brief now due on 1/24/05. (skh)
1/14/05	RETURNED from Screening (10) [04-2397] (bwb)
1/20/05	MOTION of petitioner, Jose Antonio Lopez, for extension of time to file reply brief until 2/7/05. [04-2397] [1857945] w/service 1/20/05 (cah)
1/21/05	ORDER filed:granting petitioner motion extension of time to file reply brief. [1857945-1] [1857946] NO FURTHER EXTENSIONS. Reply brief now due on 2/7/05. (cah)
2/7/05	BRIEF FILED - Reply brief - Jose Antonio Lopez. 7 pages - 10 copies - w/service 2/4/05 - w/diskette [04-2397] [1866091] (cah)
5/16/05	RECORDS received: from St. Louis. Records Included: 1 Vol. Admin. Record. [04-2397] (jab)
5/19/05	*SET FOR ARGUMENT* - June in St. Paul. (tab)

6/21/05	28(j) citation received and filed from Respondent John Ashcroft. TO COURT [04-2397] [1918360] (tab)
6/24/05	APPEARANCE for petitioner, attorney Patricia G. Mattos [04-2397] [1920065] (tab)
6/24/05	ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES Michael J. Melloy, Circuit Judge, Gerald W. Heaney, Senior Judge, Raymond W. Gruender, Circuit Judge . Patricia G. Mattos for Petitioner Jose Antonio Lopez . Russell J.E. Verby for Respondent John Ashcroft . Rebuttal by: Patricia Mattos. RECORDED. [04-2397] (tab)
8/9/05	THE COURT: Michael J. Melloy, Gerald W. Heaney, Raymond W. Gruender. OPINION FILED by Raymond W. Gruender, Authoring Judge PUBLISHED. [04-2397] [1937887] (srd)
8/9/05	JUDGMENT: Michael J. Melloy, Gerald W. Heaney, Raymond W. Gruender. DENIED [04-2397] [1937890] (srd)
9/22/05	MOTION of petitioner, Jose Antonio Lopez, to stay mandate. [04-2397] [1955566], TO COURT w/service 09/23/05 (srd)
9/28/05	JUDGE ORDER: denying petitioner motion to stay mandate [1955566-1] filed by Jose Antonio Lopez [04-2397] [1957459] (srd)
10/14/05	CERTIFIED COPIES JUDGMENT sent to Counsel [04-2397] (srd)
11/7/05	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 10/31/05. Supreme Ct. Case No.: 05-547 [04-2397] [1972370] (mer)

4/10/06	Notification from Supreme Court dated 04/03/06 stating that they had entered an order granting Supreme Court notice for certiorari in 05-547 and 05-7664 and the cases are consolidated for a one-hour allotted oral argument. [04-2397] [2033016] in Sup. Ct. No. 05-547 . [04-2397] (srd)

Proceedings Before the Immigration Judge

July 23, 1998:

[Page 6]

JUDGE TO MR. CASPER

* * *

Q. How do you plead to the six factual allegations?

[Page 7]

A. We admit the six factual allegations.

Q. There are two charges of removability. One is a controlled substance violator. Do you concede that?

A. Yes, Your Honor.

Q. The second is an aggravated felony. Do you deny that?

A. Yes, we do.

Q. All right. So there is an issue was to whether or not the respondent is an aggravated felon. Before we went on the record, you said you would be requesting some time to prepare for the hearing on that issue.

A. Yes, Your Honor.

Sept. 6, 2000:

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* * *

JUDGE FOR THE RECORD

All right. I'm going to rule on the issue of removability on the aggravated felony charge. I believe this case falls within the authority of the Court's decision in *K-V-D-*, Int. Dec. 3422 (BIA December 10th '99). There's not a

precedent decision from the 8th Circuit that controls this case to the contrary of the Board's decision in the *Matter of L-G-*. There's an unpublished 8th Circuit decision, but that is not a precedent decision in my view. So I believe this situation is still controlled by *Matter of L-G-*, 21 I&N 89 BIA (1995). So I am not going to sustain the aggravated felony charge. Respondent is still removable on the controlled substance charge.

JUDGE TO MS. KOBERSTEIN

Q. So would he designate a country for removal?

A. Mexico, Your Honor.

Q. What relief will he be seeking?

A. He'll be seeking cancellation of removal and

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voluntary departure in the alternative.

* * *

December 5, 2000:

[Page 20]

* * *

JUDGE FOR THE RECORD

The Court sustained respondent's removability on the controlled substance violation, but did not sustain the aggravated felony. We're allowing the respondent to proceed with his application for cancellation of removal.

* * *

February 25, 2002:

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* * *

JUDGE TO MR. LOPEZ

Q. Okay, sir, come on up here. I'll swear you to your application. Raise your right hand. Okay, do you swear that you know the contents of your application for cancellation of removal, including the attached documents and supplements and that they are all true and correct to the best of your knowledge?

A. Yes.

Q. Do you swear that the testimony that you'll give here today will be the truth, the whole and nothing but the truth?

A. Yes.

Q. I need you to sign these. I need you to sign by the red X here. Okay, then take the seat over in the witness stand.

JUDGE TO MS. KOBERSTEIN

Q. Give me just a minute, then you can start, Ms. Koberstein. Okay, we'll proceed with your direct then.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Mr. Lopez, what is your current address?

A. 100 East McClellan, Sioux Falls.

Q. And how long have you lived at that address?

A. I think about four years.

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Q. Okay. What's your birth date?

A. June 14, 1969.

Q. And how old are you now?

A. 32.

Q. And where were you born?

A. Tomalacalisco (phonetic sp.), Mexico.

Q. When is the first time that you ever entered the United States?

A. May 19, '86.

Q. And how old were you when you came to the United States?

A. I was going to be 17 years old.

Q. And how did you enter the United States?

A. Through San Ysidro, San Diego.

Q. Did you enter legally or illegally?

A. Illegally.

Q. And why did you decide to come to the United States at that time?

A. To get a better life than I, than I had in Mexico.

Q. Where did you live when you first came to the United States?

A. In Los Angeles, California.

Q. And how long did you live in California for?

A. We lived in California for 10 or 11 years.

Q. What did you do in California?

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A. I work at a junkyard. I work at this company Bonds, Bonds Company.

JUDGE TO MR. LOPEZ

Q. What was your first job in the United States?

MR. SOLI TO JUDGE

Q. Your Honor, perhaps we could have the interpreter pull the microphone closer. I'm a little concerned about the --

A. That's probably a good idea.

JUDGE TO INTERPRETER

Q. Go ahead.

A. The first job I had was at a Fred's Auto Wrecking.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Did you ever do any agricultural work in the United States?

A. Yes.

JUDGE TO MR. LOPEZ

Q. What years?

A. I think it was `87, `87, something like that.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Did you ever apply for a legal permanent residency in the United States?

A. Yes.

Q. When did you first apply for your residency in the United States?

A. In `88.

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Q. Do you know under what program you applied for a residency in the United States?

A. For workers in the fields.

Q. Okay. Was your application for residency in the United States approved?

A. In 1990, they give me the residency.

Q. Okay. Did you get temporary residency before 1990?

A. Yes, they give me a red permit, and then they give a green permit.

Q. In what year did you first get temporary residency in the United States?

A. In `90.

Q. Well, that was your permanent residency, correct?

A. Yes, that was, I think the pink one.

Q. Okay, but before that year did you get temporary residency?

A. Yes.

Q. Do you remember in what year you got your temporary residency, temporary?

A. I think it was in `88.

Q. Okay.

* * *

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* * *

MS. KOBERSTEIN TO MR. LOPEZ

Q. Mr. Lopez, are you currently married?

A. Yes.

Q. And what is your wife's name?

A. Maria Delaluz (phonetic sp.) Lopez.

Q. And when did you and your wife marry?

A. In 1994.

Q. And where did you get married?

A. In Mexico.

Q. Where is your wife from?

A. Tomalacalisco.

Q. And that's in Mexico?

A. It's the same town, where I, where I lived.

Q. Do you and your wife have any children together?

A. Yes.

Q. How many?

A. Two.

Q. And what are your children's names?

A. Anthony Lopez and Selma Rosaro Lopez (phonetic sp.).

Q. Okay, what are your children's birth dates?

A. Anthony was born in November of 1995, and Selma born February 6, 2000.

Q. Where were your children born?

A. Anthony, born in California; and Selma, born in South Dakota.

Q. Does your older child attend school in the United States?

A. Yes.

Q. Where does he attend school?

A. Hawthorne. I think that's it, Hawthorne.

Q. Is that in South Dakota?

A. Yes, South Dakota.

Q. What grade is he in?

A. Kindergarten.

Q. When did you move to South Dakota?

A. In 1996.

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Q. Besides California and South Dakota, have you ever lived in any other state of the United States?

A. No.

Q. Why did you decide to move to South Dakota?

A. The salaries are better out there.

Q. Okay. Since you've lived in South Dakota, what type of work have you done there?

A. I work at this slaughterhouse for a year, Dakota Pork.

Q. And before Dakota Pork, what did you do?

A. I work at a shop, auto shop in San Jose, California.

Q. In South Dakota, have you ever worked anywhere besides Dakota Pork?

A. Yes, after that, I got out of prison, I went to work for Dolphin Roofing Company and Hockinson (phonetic sp.) Farm. And then from there, I went to Morell's (phonetic sp.) for four months.

JUDGE TO MR. LOPEZ

Q Sir, except for the time you've been in jail, have you ever had any periods of unemployment?

A. No.

MS. KOBERSTEIN TO MR. LOPEZ

Q. What do you do now to earn a living?

A. I do have a grocery store in South Dakota, Sioux

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Falls, South Dakota.

Q. Are you the owner of that grocery store?

A. Yes.

Q. What's the name of the store?

A. Lopez Mexican Crafts.

Q. Okay. Do you own the store by yourself or do you own it with other people?

A. Myself.

Q. Okay. Is this the only business that you've ever owned?

A. Last year I had a taco stand.

Q. Okay, and where did you have the taco stand?

A. At the same, Sioux Falls.

Q. Okay. How long have you had the grocery store?

A. Since last year, since June of last year.

Q. June of 2001?

A. Yes.

Q. Do you work at the store?

A. Yes.

Q. How many days a week do you work there?

A. Seven days.

Q. Usually how many hours a day do you work there?

A. We're open at 9 a.m. until 9 p m

Q. And are you usually there all those hours?

A. When I have to get merchandise, my wife is there.

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But usually, me and my wife will take turns.

JUDGE TO MR. LOPEZ

Q. Sir, does your wife have permission to work in the United States?

A. No.

Q. Okay.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Do you employ any other people at the store?

A. No.

Q. Is the store profitable at this time?

A. No, I don't think it's that bad because we're living out of there.

Q. Are you making enough money to support your family?

A. I think so.

Q. Besides the grocery store, are you working at any other place right now?

A. At the moment, no.

JUDGE TO MS. KOBERSTEIN

Q That'd be a pretty good trick if he's working 80 hours a week at the grocery store, Ms. Koberstein.

A. Just wanted to clarify that.

Q. Okay.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Did you have to apply for any licenses to open the

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store?

A. Yes.

Q. What type of licenses did you need?

A. For the taxes, for the city and the health department.

Q. Okay. Have you ever personally used welfare in the United States in your own name?

A. No, never.

Q. Has anyone in your immediate family ever used any welfare in the United States?

A. My two children have had Medicare, both for only two years.

Q. Are they receiving Medicare or medical assistance now?

A. Not at the moment.

Q. Have they ever used any cash assistance?

A. No, never.

JUDGE TO MR. LOPEZ

Q. No food stamps?

A. Never.

* * *

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* * *

A. Okay. How many times have you ever been arrested by the police in the United States?

[Page 40]

Q. Only one time.

A. You were arrested one time?

Q. Yes.

A. And when did that arrest take place?

Q. `97.

A. And where were you arrested?

Q. Huron, South Dakota.

JUDGE FOR THE RECORD

Huron, H-U-R-O-N.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Were you charged with a crime in relation to that arrest?

A. Yes.

Q. And what were you charged with?

A. Aiding and abetting the possession of cocaine.

Q. Okay. Who was the person that you were charged with aiding and abetting?

A. Juan Valdez.

Q. And was Mr. Valdez a friend of yours

A. No, no, not really.

Q. How did you know Mr. Valdez?

A. Through his brother. I know, I know his brother better.

Q. Okay. Were you found guilty of that charge?

A. Yes.

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Q. Did you plead guilty?

A. Yes.

Q. Okay.

JUDGE TO MS. KOBERSTEIN

Q. Why don't we hear something about the circumstances of the crime. From what I've seen here, it's really, the documentation I have, there was no PSI, is there?

A. Yes, I will be asking him questions about it.

MR. SOLI TO JUDGE

Q. Is there a PSI?

A. No. I didn't see one. That was not in the file.

MS. KOBERSTEIN TO JUDGE

Q. I'm not aware that one was done, no.

MR. SOLI TO JUDGE

Q. It would be done on a felony charge.

A. Well, let's get the details of the crime.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Did the police search your home in relationship to that arrest?

A. Yes.

Q. Did the police find drugs at your house?

A. No.

Q. What did the police find at your house?

A. They found money that Juan Valdez, Juan Valdez pay me.

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JUDGE TO MR. LOPEZ

Q. How much money?

A. $600, yeah, about $600.

Q Why did he pay you pay $600?

A. Yes, when Juan Valdez went to jail, his brother asked me for some money to, to get a bail, and that's why I brought him the money.

MS. KOBERSTEIN TO MR. LOPEZ

Q How many days before the police searched your home had Juan Valdez been arrested?

A. (Interpreter) Interpreter would like to have a repetition.

Q. How many days before the police searched your home had Mr. Valdez been arrested?

A. One, I think it was two days.

Q. Okay. Who asked you for help in paying Mr. Valdez's bond?

A. His brother, Adam Valdez.

Q. And did you lend him money to help pay for Mr. Valdez's bond?

A. Yes.

Q. Who did you give the money to?

A. To Adam Valdez.

Q. Okay, when had the money been returned to you?

A. Two days after that when that happened.

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Q. Who returned the money to you?

A. Juan Valdez.

Q. Did he come to your house and give you the money?

A. Yes.

Q. Did he tell you why he was returning the money to you?

A. Yes, he said it was the money that I borrow him.

Q. But did he have any explanation why he didn't need the money any longer?

A. No.

Q. Okay. How long after Mr. Valdez returned to money to you did the police come and search your home?

A. About two, three hours.

Q. Why did the police think that you aided and abetted Mr. Valdez to possess cocaine?

A. Because he told him that I give, give him that to, to him.

Q. He told you the police that you gave him cocaine?

A. Yes.

Q. Did you give cocaine to Mr. Valdez?

A. No.

Q. Did you sell cocaine to Mr. Valdez?

A. No.

Q. What did you do to aid and abet Mr. Valdez in possessing cocaine?

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A. In one conversation I told him that I knew somebody that was selling those things. But I didn't think that this was going to be such a bad thing.

Q. Did Mr. Valdez ask you where he could buy cocaine?

A. Yes.

Q. When did he ask you that?

A. That was about a few days before that.

Q. A few days before his arrest?

A. Yes.

Q. Did you tell Mr. Valdez where he could buy cocaine?

A. Yes.

Q. How did you know where someone could go to buy cocaine?

A. In that town there were a few Hispanics, you know, so long you (indiscernible) and for a reason, for one reason I found out and for me that was the easy thing to do to tell him that.

Q. Did you call that person for Mr. Valdez and help him arrange to buy cocaine?

A. No, I didn't. No, I never seen the drugs.

Q. Besides telling Mr. Valdez where he could buy them, buy the drugs, did you help him in any way to get those drugs?

A. No.

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Q. Have you ever been involved in the sale of illegal drugs?

A. Only that time.

Q. Okay. Have you ever personally sold illegal drugs?

A. No, never have.

JUDGE TO MR. LOPEZ

Q. Have you ever used any illegal drugs in the United States?

A. Never.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Do you admit wrongdoing in what happened with Mr. Valdez?

A. Yes.

Q. What do you think that you did wrong in that incident?

A. I helped him out to obtain the drugs.

Q When you were arrested in 1997, were you working at the time?

A. Yes.

Q. Where were you working?

A. In Dakota Pork.

Q. Were you working there full time?

A. Yes.

Q. Okay. Were you arrested in the beginning of 1997

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or the end of 1997 or when?

A. At the beginning, I think it was around March.

Q. What sentence did you receive for your conviction?

A. Five years.

Q. And how much time did you actually serve in prison?

A. 15 months.

Q. Why were you only required to serve 15 months?

A. Well, for my good, my good conduct, if you behave, you only do 25 percent of it.

Q. Okay. Were you placed on probation when you were released from prison?

A. Yes.

Q. How long were you on probation for?

A. For four years, but three or four months ago, they dropped it.

Q. As part of your probation, were you ever drug tested?

A. Yes.

Q. Did you ever fail a drug test?

A. Never.

Q. Did you pay all the fines and restitution ordered by the Court?

A. Yes.

Q. Was Mr. Valdez ever convicted of a crime in

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relation to those arrests?

A. (Interpreter) Interpreter would like to have a repetition.

Q. Was Mr. Valdez ever convicted of a crime?

A. For that time what I know.

Q. Do you know what he was convicted of?

A. Yes.

Q. What was he convicted of?

A. I don't know how long they give him, but he was in the same prison that I was at.

Q. What he charged with possession of cocaine?

A. I think so.

JUDGE FOR THE RECORD

Let's go to the next tape.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

This is tape 2, file A 91 726 777.

JUDGE TO MS. KOBERSTEIN

Q. Go ahead.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Do you know where Mr. Valdez is now?

A. I don't have idea.

Q. All right. Is he still in prison?

A. No, he got out before I did.

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Q. Are you in contact with him at all?

A. No.

Q. Have you ever had any alcohol abuse problems?

A. Never.

Q. Have you ever gone through drug or alcohol treatment?

A. No.

Q. Do you associate now with anyone who's involved with illegal drugs?

A. No.

Q. Do you think you've learned anything from your experience of being arrested back in 1997?

A. Yes.

Q. What do you think you've learned from that experience?

A. What I learned is you can't really trust anybody and you can't really, well, I don't know. I think, I guess, it make me see things differently.

Q. Do you think you'll ever be involved in another situation like that again in the future?

A. I don't think so.

Q. Why not?

A. Okay, I think, because if, if you work and dedicate yourself to your house, I don't think you have to get involved in a situation like that.

Q. Besides that arrest in 1997, have you ever been arrested on any other occasion in the United States?

A. No, never.

Q. Have the police ever been called to your house for any reason?

A. No. Never been arrested for drunk driving?

Q. No.

A. Have you ever been arrested by the police in Mexico?

JUDGE TO MS. KOBERSTEIN

Q. He said, no. Sorry, go ahead.

MR. LOPEZ TO MS. KOBERSTEIN

Q. No.

A. Have you ever owned property in the United States?

Q. I have a trailer where I, I have my trailer where I live.

A. And are you the owner of that trailer?

Q. Yes.

A. Do you have any other plans to own property in the United States?

Q. I'm in the process, I'm in the process to buy a house in Worthington, Worthington, yeah. Because the paperwork's not done. I went to see the house and everything, but because the agreement is going to be between me and that, that woman, so the attorney hasn't done all the paperwork.

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A. Okay. If you are allowed to remain in the United States, what kind of plans do you have for your future?

Q. Well, to work in my business and to make it grow and expand for the future.

A. Have you filed a petition to immigrate your wife to the United States?

Q. Yes.

A. Okay.

JUDGE TO MR. LOPEZ

Q. What year, what year did you file that?

A. Last year.

MS. KOBERSTEIN TO MR. LOPEZ

Q. Do you know what the status of that petition is?

A. She's been approved. She's just waiting for her turn.

Q. Okay.

MS. KOBERSTEIN TO JUDGE

Q. I have no further questions at this time, Your Honor.

JUDGE TO MR. SOLI

Q. Cross.

MR. SOLI TO MR. LOPEZ

Q. How far is Huron from Worthington?

A. I think it's about three hours.

Q. Where is your grocery store located?

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A. In Sioux Falls.

Q. How far is Sioux Falls from Worthington?

A. It's over 45 minutes.

Q. Did you attend school in Mexico?

A. To middle school.

Q. How many years were you in school?

A. About second grade of middle school. That's about seven years, eight years.

Q Did you finish the secondary school?

A. No, I didn't finish it.

Q. And how old were you when you left school?

A. I was about 15 years old.

Q. What did you do right after you left school?

A. I work, I work, I work with one of my uncles in a jewelry store.

Q. Your uncle had a jewelry store?

A. Yes, he had a jewelry store.

MR. SOLI TO JUDGE

Q. I can't hear the interpreter.

A. (Interpreter) He had a jewelry store.

MR. SOLI TO MR. LOPEZ

Q. And how long did you do that?

A. About six, seven months. I don't remember.

Q. And then what did you do?

A. And I worked at a, just a second -

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Q. -- craft store.

A. - crafts, I worked for the crafts. And my whole family are involved in that.

Q. What type of crafts does your family make?

A. Clay.

Q. I'm sorry?

A. Clay.

Q. And is your family in Mexico still involved in crafting material out of clay?

A. Yes.

Q. Is that how they support themselves?

A. Yes.

* * *

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* * *

Q. The store you're now operating, is it located in a building you own?

A. (Interpreter) Interpreter would like -

Q. I'll repeat the question. Lopez Mexican Craft and Market, is that located in a building owned by you or by someone else?

A. Somebody else.

Q. Who?

A. Morei (phonetic sp.) Construction.

Q. How much do you pay a month for rent or lease of the property?

A. 675 plus bills.

Q. How much did it cost to purchase an inventory for your store when you first opened?

A. I think about $6,000, 6, $7,000.

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Q. Where did you get the money?

A. I work at Hockinson Farm, and I had a taco stand. Then I sold it and with that money, it helps out to open the store.

Q. Did you take out any loans?

A. No.

Q. Have you ever been sued?

A. No.

Q. Have you ever filed for bankruptcy?

A. No, never.

* * *

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* * *

Q. Okay. What were you initially charged with in connection with your crime?

A. Aiding and abetting of possession of cocaine.

Q. No, that's what you plead guilty to, isn't it?

A. Yes.

Q. Weren't you indicted for, to read from the indictment, from November '96 through March 11, '97, Jose Antonio Lopez committed the public offense of possession of a controlled substance?

A. Well, no. I did have a charges of a possession and distribution and for the place to sell. But they all, they, all those got dropped and they only left me the charges about aiding and abetting.

* * *

July 12, 2002:

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JUDGE TO MS. KOBERSTEIN

Q. Okay. Do you waive reading of the I-261, Ms.

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Koberstein?

A. Yes, Your Honor.

Q. How do you plead to the additional allegation?

A. We admit the additional allegation.

Q. Okay, this case has been going for a while on a cancellation application. In the Notice to Appear, I had originally not sustained the aggravated felony charged based on *K-V-D-*. *K-V-D-* is now overruled by *Mater of Yanez*. As I read *Matter of Yanez*, it looks like the respondent would be convicted of an aggravated felony based on the 8th Circuit precedent *Briones-Mata*. You want to educate me otherwise?

A. Well, yes. I don't agree that the respondent falls within *Yanez* in this case.

* * *

Administrative Record Excerpts

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
COUNTY OF BEADLE

STATE OF SOUTH DAKOTA, *Plaintiff*,

vs.

JOSE ANTONIO LOPEZ, aka ANTONIO JOSE LOPEZ, aka ANTONIO GARCIA LOPEZ, aka TONI LOPEZ aka ANTONIO GARCIA aka JOSE ANTONIO LOPEZ ESPRZA, *Defendant*.

JUDGMENT AND CONVICTION AND SENTENCE

Court File #97-289

An Information was filed with this Court on the 1st day of July 1997, charging the Defendant JOSE ANTONIO LOPEZ with the crime of AIDING AND ABETTING THE POSSESSION OF CONTROLLED SUBSTANCE (SDCL 22-42-5 & 22-3-3).

The Defendant was arraigned on said Information on the 1st day of July 1997. The Defendant, and his attorney, Gary Blue and Kaarin Long, Deputy Beadle County State's Attorney, appeared at the Defendant's arraignment.

The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge filed against the Defendant. The Defendant pled guilty of the charge of

AIDING AND ABETTING THE POSSESSION OF CONTROLLED SUBSTANCE (SDCL 22-42-5 &22-33-3).

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntary, knowing and intelligent; that the Defendant was represented by competent counsel; and that a factual basis existed for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of AIDING AND ABETTING THE POSSESSION OF A CONTROLLED SUBSTANCE IN violation of (SDCL 22-42-5 & 22-3-3)

SENTENCE

On the 12th day of September, 1997, the Defendant and his attorney Gary Blue and Kaarin Long appeared for the State of South Dakota, the Court asked whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, JOSE ANTONIO LOPEZ shall pay court costs in the amount of $26.50.

IT IS HEREBY ORDERED that the Defendant shall serve five (5) years in the South Dakota State Penitentiary, Sioux Falls, South Dakota.

IT IS FURTHER ORDERED that the Defendant shall receive credit for time served in the Regional Correction Center, Huron, South Dakota, from March 13, 1997, to September 12, 1997, (184 days), and from September 12, 1997, until the Defendant is received at the South Dakota State Penitentiary, Sioux Falls, South Dakota.

IT IS FURTHER ORDERED that the Defendant shall reimburse Beadle County for his court-appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant pay to the Beadle County Clerk of Courts for reimbursement to the Office of Attorney General, 500 E. Capitol, Pieere, South Dakota 57501) for the costs of grand jury transcripts attributable to the Defendant in this action in the amount of one hundred twenty-nine dollars ($129.00).

IT IS FURTHER ORDERED that the Defendant pay to the Beadle County Clerk of Courts (for reimbursement to the Statewide Drug Task Force, & Division of Criminal Investigation, E. Highway 34, Pierre, South Dakota, 57501) for the costs of testing the controlled substance in this case in the amount of $50.00.

IT IS FURTHERED ORDERED that the Defendant be remanded to the custody of the Sheriff of Beadle County, South Dakota, pending execution of this sentence and the Sheriff is hereby directed to immediately transport the Defendant to the South Dakota State Penitentiary, Sioux Falls, South Dakota.

Dated this 12 day of September, 1997, at Huron, Beadle County, South Dakota.

BY THE COURT:

/s/

EUGENE L. MARTIN

Circuit Court Judge

ATTEST:

/s/

Beadle County Clerk of Courts

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
COUNTY OF BEADLE

STATE OF SOUTH DAKOTA, *Plaintiff*,

v.

JOSE ANTONIO LOPEZ, aka 6-14-69, *Defendant*.

Crim. No. 97-289

INFORMATION FOR: AIDING AND ABETTING THE POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: COCAINE (SDCL 22-42-5, 22-3-3)

(CLASS 5 FELONY)

M. Bridget Mayer, as prosecuting attorney in the name of and by the authority of the State of South Dakota, makes and files this Information against Jose Antonio Lopez, and charges as to:

Count I

That during the approximate month of March, 1997, within Beadle County, South Dakota, Jose Antonio Lopez did commit the public offense of AIDING AND ABETTING THE POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: COCAINE in that he did, then and there, aided, abetted, or advised another person, i.e. Juan Valdez, to possess a controlled substance, to-wit: cocaine, in violation of SDCL 22-42-5 & 22-3-3; contrary to statute in such case made and provide against the peace and dignity of the State of South Dakota.

Dated this 1st day of July 1997, at Pierre, South Dakota.

/s/

M. Bridget Mayer
Assistant Attorney General
Prosecuting Attorney

STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

M. Bridget Mayer, being first duly sworn, states that she is the prosecuting attorney for the above matter, that she has read the foregoing Information, and the same is true to her own best knowledge, information and belief.

/s/

Prosecuting Attorney

WITNESSES KNOWN TO THE PROSECUTING ATTORNEY AT THE TIME OF THE FILING OF THIS INFORMATION:

Juan Valdez

Todd Ingalls

John Bierne

Roger Mathison

WITNESSES WHO BECAME KNOWN TO THE PROSECUTING ATTORNEY AFTER THE FILING OF THE INFORMATION AND ENDORSED WITH THE PERMISSION OF THE COURT:

U.S. Department of Justice
Immigration and Naturalization Service

Additional Charges of Inadmissibility/Deportability

In: ☒ Removal proceedings under section 240 of the Immigration and Nationality Act

☐ Deportation proceedings commenced prior to April 1, 1997 under former section 242 of the Immigration and Nationality Act

---

In the Matter of:

Alien/Respondent:	Jose Antonio Lopez
File No.:	A91 726 777
Address:	100 East McCleellan St. #12 Sioux Falls, SD

There is/are hereby lodged against you the additional charge(s) that you are subject to being taken into custody and deported or removed from the United States pursuant to the following provision(s) of law:

In support of the additional charge(s) there is submitted the following allegation(s) ☒ in addition to ☐ in lieu of those set forth in the original charging documents:

7. You were sentenced in a term of five-years imprisonment for this felony conviction.

Dated: July 12, 2002

/s/

(Signature of Service Consul)

Notice to Respondent
Jose Antonio Lopez

Warning: Any statement you make may be used against you in removal proceeding.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the charging document and that you are inadmissible or deportable on the charges contained in the charging document. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the

receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change our address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of the hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Certificate of Service

This charging document was served on the respondent by me on July 12, 2002, in the following manner in compliance with section 239(a) (1) of the Act:

☒ in person

☐ by certified mail, return receipt requested

☐ by regular mail

to: Jose Antonio Lopez

☐ The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b) (7) of the Act.

/s/

Richard Soli
District Counsel

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
COUNTY OF BEADLE

STATE OF SOUTH DAKOTA, *Plaintiff*,

v.

JOSE ANTONIO LOPEZ, *Defendant*.

DISMISSAL OF INDICTMENT

COUNT I-POSSESSION OF CONTROLLED SUBSTANCE

COUNT II-CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE

COUNT III-DISTRIBUTION OF A CONTROLLED SUBSTANCE

Court File #97-120

Pursuant to SDCL 23A-44-2, KAARIN LONG, the prosecuting attorney dismisses the Indictment that has been filed in this case, as it pertains to JOSE ANTONIO LOPEZ only.

Dated the 12th day of September, 1997, at Huron, South Dakota.

/s/

Prosecuting Attorney
KAARIN LONG

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
COUNTY OF BEADLE

STATE OF SOUTH DAKOTA, *Plaintiff*,

v.

JOSE ANTONIO LOPEZ,
DOB: ~~10-3-67~~ 6-14-69,

and

RUBIN L/N/U/,*Defendants*.

THE BEADLE COUNTY GRAND JURY CHARGES:

COUNT I

That during an approximate time frame of November, 1996, through March 11, 1997, in the County of Beadle, State of South Dakota, Jose Antonio Lopez did commit the public offense of POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), in that he did knowingly possess a controlled substance, to-wit: Cocaine, in violation of SDCL 22-42-5; and as to

COUNT II

That during an approximate time frame of November, 1996, through March 11, 1997, in the County of Beadle, State of South Dakota, Jose Antonio Lopez and/or Rubin L/N/U did commit the public offense of CONSPIRACY TO DISTRIBUTE CONTROLLED (COCAINE) in that each did conspire and agree with either each other and/or Juan Valdez and/or any other known or unknown co-conspirators, to commit the offense of DISTRIBUTION OF A CONTROLLED SUBSTANCE in violation of SDCL

22-3-3 and 22-42-2, and did one or more acts in furtherance of the conspiracy, to-wit:

1. Jose Antonio Valdez or "Tony" "fronted" marijuana to Juan Valdez (Valdez) in November, 1996 in Huron, South Dakota;

2. Prior to Christmas, 1996, Tony gave Valdez one or two eight ball quantities of cocaine. This occurred in the residence in the 800 block of Iowa Avenue, S.E., in Huron;

3. Prior to Christmas, 1996, Tony fronted additional cocaine to Valdez in Huron;

4. Approximately one month prior to March 11, 1997, Tony and Valdez met in a residence in the 900 block of Colorado Avenue in Huron, South Dakota, where approximately four ounces of cocaine was fronted to Valdez by Tony for approximately $1,200 to $1,250 per ounce;

5. Valdez weighted each ounce with his electronic gram scale in Tony's presence;

6. On or about March 7, 1997, Valdez asked Tony for more cocaine and Tony directed Valdez to call Rubin L/N/U;

7. Valdez called Rubin and Rubin told Valdez to meet him at the lunch room in Dakota Pork in Huron, South Dakota;

8. Valdez met Rubin at the lunch room in Dakota Pork and was fronted approximately four ounces of cocaine;

9. Valdez called Tony to find out the price he was to pay Tony for the cocaine that Rubin had fronted for Tony. Tony told Valdez the price would be $1,200 per ounce for two of the ounces and $1,250 per ounce for each of the other two ounces;

10. On or about March 12, 1997, Tony accepted from Valdez, $625 for cocaine that had previously been fronted to Valdez; and as to

COUNT III

That during an approximate tine frame of November, 1996, through March 11, 1997, in the County of Beadle, State of South Dakota, Jose Antonio Lopez did commit the public offense of DISTRIBUTION OF A CONTROLLED SUBSTANCE (COCAINE) in that he did distribute a controlled substance, to-wit: Cocaine, to Juan Mart-in Valdez, in violation of SDCL 22-42-2; and as to

COUNT IV

That during an approximate time frame of March 7, 2997, in the County of Beadle, State of South Dakota, Rubin L/N/U did commit the public offense of DISTRIBUTION OF A CONTROLLED SUBSTANCE (COCAINE), in that he did distribute a controlled substance, to-wit: Cocaine, to Juan Martin Valdez; and as to

COUNT V

That during art approximate time of March 7, 1997, in the County of Beadle, State of South Dakota, Rubin L/N/U did commit the public offense of POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), in that he did knowingly possess a controlled substance, to-wit: Cocaine, in violation of SDCL 22-42-5; in violation of SDCL 22-42-2; contrary to the statutes in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 21 day of March, 1997, at Huron, South Dakota.

"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

/s/

Grand Jury Foreperson

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARD TO THIS INDICTMENT:

Juan Martin Valdez
Todd Ingalls
John Bierne

Supreme Court, U.S.
FILED
JUN 19 2006
OFFICE OF THE CLERK

(4)

No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

Patricia G. Mattos
MATTOS LAW OFFICE
595 Selby Ave.
St. Paul, Minn. 55012
(651) 726-2514

Robert A. Long
Counsel of Record
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1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioner

June 19, 2006

QUESTION PRESENTED

Whether an immigrant who is convicted in state court of a drug crime that is a felony under the State's law but a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a, is reported at 417 F.3d 934. The opinion of the Board of Immigration Appeals, Pet. App. 8a, and the oral decision of the Immigration Judge, Pet. App. 10a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2005. Pet. App. 1a. The petition for a writ of certiorari was filed on Oct. 31, 2005, and was granted on April 3, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, 18 U.S.C. §§ 924 and 3559, and the Controlled Substances Act, 21 U.S.C. §§ 802 *et seq.*, are reproduced in the appendix to this brief. App., *infra*, 1a-11a.

STATEMENT OF THE CASE

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, establishes the conditions under which noncitizens may enter and remain in the United States, as well as the circumstances in which they may or must be deported. This case concerns the provisions of the INA that apply to noncitizens who have attained the status of lawful permanent residents, and who are convicted of illegal possession of a controlled substance.

1. Deportability For Drug-Related Crimes. The INA provides that "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the

Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i). The INA also provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to include (among other offenses) "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(B). The INA further provides that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." *Id.*

Section 924 of title 18 is a criminal statute that defines and establishes punishments for various firearms-related offenses. Subsection (c) of section 924 provides an additional term of imprisonment whenever a person uses or carries a firearm during "any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c). Section 924(c) defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*)." *Id.*

The Controlled Substances Act defines a range of drug-related felonies under federal law, including the manufacture and distribution of a controlled substance and possession of a controlled substance with intent to distribute it. *See* 21 U.S.C. §§ 841-843. The Controlled Substances Act also proscribes knowingly possessing a controlled substance. 21 U.S.C. § 844(a). Most first-time "simple possession" offenses, including the offense at issue in this case, are punished as misdemeanors under

the Controlled Substances Act. *See id.*; 18 U.S.C. § 3559(a)(6) (federal offense with a maximum term of imprisonment of one year is a Class A misdemeanor).

2. Consequences Of An Aggravated Felony Conviction. Lawful permanent residents who are deportable under 8 U.S.C. § 1227(a)(2)(B)(i) for a drug-related conviction that is not an aggravated felony are eligible to apply for cancellation of removal and asylum, and may not be deported to a country where their life or freedom would be threatened. *See* 8 U.S.C. §§ 1158(a)(1) (asylum), 1229b (cancellation), 1231(b)(3) (withholding of removal).[1] If the individual is convicted of a drug offense that is an "aggravated felony," the consequences are much more severe:

- Permanent residents convicted of an aggravated felony are subject to mandatory deportation, no matter what their individual circumstances. An aggravated felony conviction renders a lawful permanent resident ineligible for cancellation of removal or asylum. *See* 8 U.S.C. §§ 1229b (cancellation of removal), 1158(b)(2)(B) (asylum). Individuals convicted of an aggravated felony and sentenced to at least five years' imprisonment are also ineligible for withholding of removal. *Id.* § 1231(b)(3)(B).
- Permanent residents convicted of aggravated felonies may not apply for voluntary departure as an alternative to deportation proceedings. *See* 8 U.S.C. § 1229c(a)(1).

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[1] The INA defines "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The statute defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." *Id.* § 1101(a)(20).

- An aggravated felony conviction bars a permanent resident from ever becoming a naturalized citizen of the United States. *See* 8 U.S.C. §§ 1101(f)(8) (naturalized citizen must be of good moral character); 1427(a)(3) ("No person shall be regarded as, or found to be of good moral character who ... has been convicted of an aggravated felony.").

- A permanent resident convicted of an aggravated felony is barred from ever returning to the United States. *See* 8 U.S.C. § 1182(a)(9)(A)(i). An individual who returns to the United States after deportation for an aggravated felony is subject to imprisonment for up to 20 years. *See* 8 U.S.C. §§ 1326(a)(2), (b)(1) & (b)(2).[2]

3. Interpretation Of Aggravated Felony Provision. When Congress first added an "aggravated felony" provision to the INA in 1988, it defined the term to include "any drug trafficking crime as defined in section 924(c)(2) of title 18." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70. Section 924(c) then, as now, provided that a "drug trafficking crime" is "any felony punishable under the

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[2] Under the Federal Sentencing Guidelines, an alien convicted of illegally reentering or remaining in the United States following conviction for an aggravated felony receives an 8-point sentence enhancement. *See* U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C). Application note 3 states that "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act." *Id.* cmt. n.3. Application note 2 states that "'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year." This definition applies, however, only to "subsection[s] (b)(1)(A), (B), and (D)," and not to subsection (C), the provision dealing with aggravated felonies. *Id.*

Controlled Substances Act," the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. 18 U.S.C. § 924(c)(2) (1988).

In 1990, the Board of Immigration Appeals ("BIA") construed the aggravated felony provision and held that a conviction in state court for possession of a controlled substance with intent to manufacture or distribute was a "drug trafficking crime," even though the conviction was obtained under state law rather than federal law. *In re Barrett*, 20 I. & N. Dec. 171, 175 (B.I.A. 1990). The Board concluded "that the definition of 'drug trafficking crime' for purposes of determining drug-related 'aggravated felonies' within the meaning of the Immigration and Nationality Act encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act." *Id.*

Within months after the BIA's decision in *Barrett*, Congress amended the definition of "aggravated felony" in the INA to provide that an aggravated felony means "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act, including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code." Pub. L. No. 101-649 § 501, 104 Stat. 4978, 5048 (1990), codified at 8 U.S.C. § 1101(a). Congress also added a provision specifying that the term aggravated felony applies "to offenses described . . . whether in violation of Federal or State law." *Id.* Congress thus made clear that the term "aggravated felony" extends to state drug trafficking convictions like Barrett's. *See* S. Rep. No. 55, 101st Cong. 2d Sess. (1990); 136 Cong. Rec. S17,106, S17,117 (Oct. 26, 1990) (Statement of Sen. Graham) (The amendments "[e]xtend the definition of aggravated felony to include aliens convicted of like State crimes, codifying a recent ruling of the Immigration Board of Appeals.").

Two years later, the BIA interpreted the amended definition of "aggravated felony" in *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992). In *Davis*, the government appealed an Immigration Judge's decision that a state-law misdemeanor conviction for conspiracy to distribute controlled substances was not a "drug trafficking crime" and therefore was not an aggravated felony. *Id.* The Board held that "for a finding of 'drug trafficking crime' the alien's offense must be a felony offense under one of the three statutes listed in 18 U.S.C. § 924(c)(2)" or it must be "analogous" to such an offense. *Id.* at 543.

The Board adhered to its decision in *Davis* for the next decade. In 1995, for example, the Board considered a simple possession conviction from Louisiana that, while classified as a felony under the state law, was a misdemeanor under federal law. *In re L--G--*, 21 I. & N. Dec. 89, 90-91 (B.I.A. 1995). The government argued that a state conviction is a drug trafficking crime under 18 U.S.C. § 924(c)(2) if it is a felony under state or federal law and the conduct is proscribed by the Controlled Substances Act. *Id.* at 93. The Board looked to title 18 for the meaning of the term "any felony" and determined that the language referred to any of the classes of federal felonies defined by 18 U.S.C. § 3559(a). The BIA concluded that its interpretation was consistent with congressional intent and the statutory history of § 924(c)(2). *Id.* at 94-95.

In the interval between the Board's decisions in *Davis* and *L--G--*, the Second Circuit decided *Jenkins* v. *INS*, 32 F.3d 11 (2d Cir. 1994). In *Jenkins*, the court held that a state-law felony drug possession crime was a "drug trafficking crime," and therefore an aggravated felony for immigration purposes, even if the offense was classified as a misdemeanor under the Controlled Substances Act. *Id.* at 13-14. In *L--G--*, the Board disagreed with the *Jenkins* court's analysis that a state-law drug possession felony is a "felony punishable under the Controlled

Substances Act" and found that a uniform federal definition of "felony" would prevent inconsistent results based on the States' varying punishment schemes for drug offenses. 21 I. & N. at 96-102. For this reason, the Board declined to follow *Jenkins* outside the Second Circuit. *Id.* at 101. The Second Circuit subsequently reconsidered its position and agreed with the BIA, concluding that the statutory interpretation question was "fairly debatable" and that the interest in "nationwide uniformity" outweighed the interest in adhering to circuit precedent. *Aguirre* v. *INS*, 79 F.3d 315, 317-18 (2d Cir. 1996).

Thereafter, two other circuits held that a state-law drug possession felony could constitute a drug trafficking aggravated felony for purposes of the Federal Sentencing Guidelines. *E.g.*, *United States* v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), *United States* v. *Briones-Mata*, 116 F.3d 308, 310 (8th Cir. 1997). The BIA held that these decisions under the Sentencing Guidelines did not preclude it from applying its own precedent for immigration and deportation purposes in the Fifth and Eighth Circuits. *See In re K-V-D-*, 22 I. & N. Dec. 1163, 1170 (B.I.A. 1999). The Board concluded that the need for uniformity in the immigration context is "paramount" because the aggravated felony provision sanctions "an existing violation of federal immigration law" civilly, whereas in the Sentencing Guidelines context, the primary goal is to punish recidivism. *Id.* at 1172.

In 2002, the Board changed course. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002). The Board noted that the circuits had split on the interpretation of "drug trafficking crime" under INA section 101(a)(43)(B). Some circuits agreed with the Board's prior decisions, while others disagreed in the Sentencing Guidelines context; the Board noted that the circuits were also split over the propriety of adopting different interpretations for sentencing and immigration.

Id. at 395-96. The Board concluded that "uniformity is presently unattainable" and "the best approach is one of deference to applicable circuit authority." *Id.* at 396. The Board decided that in all circuits that had not yet spoken, it would follow the approach that had been adopted in a majority of Sentencing Guidelines cases: that a state-law possession charge constitutes a "drug trafficking crime" if it is classified as a felony by the State. *Id.* at 397.

After the Board's decision in *In re Yanez-Garcia*, three additional circuits held that a state felony possession offense that is a federal misdemeanor is not a "drug trafficking crime" under section 101(a)(43)(B) of the INA. *See Gonzales-Gomez* v. *Achim*, 441 F.3d 532 (7th Cir. 2006); *United States* v. *Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004). Thus, a total of five circuits (the Second, Third, Sixth, Seventh, and Ninth) now hold that a state-law drug possession felony is not an aggravated felony for federal immigration purposes, while two circuits (the Fifth and Eighth) hold to the contrary. *See* Pet. App. 9-13; *Gonzales-Gomez*, 441 F.3d at 533.[3]

4. Factual Background. Petitioner Jose Antonio Lopez first came to the United States in 1985, entering

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[3] In the Sentencing Guidelines context, eight circuits consider a state-law possession felony to be a drug trafficking crime, regardless of whether the offense is a felony under federal law, while one circuit recently held that only federal felonies are drug trafficking crimes. *Compare United States* v. *Wilson*, 316 F.3d 506, 513 (4th Cir. 2003); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1341 (9th Cir. 2000); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 148 (2d Cir. 1999); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999); *Hinojosa-Lopez*, 130 F.3d at 694; *Briones-Mata*, 116 F.3d at 309; *United States* v. *Cabrera Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996) *with Palacios-Suarez*, 418 F.3d at 700.

San Diego, California from Mexico. J.A. 9; Pet. App. 18a. Petitioner initially worked on farms growing tomatoes, grapes, and grapefruit. R. 159. In 1988, Petitioner applied for residency through the Special Agricultural Worker program, 8 U.S.C. § 1160. J.A. 10; Pet. App. 2a. Petitioner was approved for temporary residency in 1988; his application for permanent residency was approved on December 1, 1990. J.A. 10.

In 1994, Petitioner married Maria Delaluz Lopez in Mexico. J.A. 11. She entered the country legally with a visa that same year. Pet. App. 14a. Petitioner and his wife have two children, both citizens of the United States. J.A. 15.

Petitioner eventually opened two businesses. He first opened a taco stand in Sioux Falls, South Dakota, for which he obtained the proper food service and department of revenue licenses. R. 267, 292-93. After a year, he sold the taco stand and opened a grocery store. J.A. 14, 28-29. Petitioner again applied for and received the appropriate licenses from the City of Sioux Falls and the State of South Dakota for his business. R. 263-64.

During his years in the United States, Petitioner was arrested once in Huron, South Dakota in 1997. Pet. App. 13a; J.A. 16. Petitioner admitted telling a third party where to find drugs and ultimately pleaded guilty to aiding and abetting possession of cocaine, though he maintained that he never possessed cocaine himself. J.A. 16, 20-21. Under the Controlled Substances Act, a first offense of possession of cocaine is a misdemeanor punishable by not more than one year of imprisonment. *See* 21 U.S.C. § 844(a). Under the applicable South Dakota law, however, possession of cocaine was a Class 5 Felony, punishable by up to 5 years in prison. S.D. Codified Laws § 22-42-5 (1997). (South Dakota law treats aiders and abettors the same as principals. S.D. Codified Laws § 22-6-1).

Petitioner was sentenced to five years' imprisonment, but was released after fifteen months because of good behavior. J.A. 22. Petitioner was granted a rare "Early Release" from parole for good behavior, which his parole officer stated is "something that does not happen often in South Dakota." R. 256; J.A. 22. Petitioner's parole officer wrote two letters of recommendation supporting Petitioner's application for cancellation of removal, stating that Petitioner was "one of the best parolees [he has] ever had." R. 256; *see also* R. 291.

5. Proceedings Before The Immigration Judge. On April 17, 1998, the INS instituted removal proceedings against Petitioner. The INS initially charged Petitioner as being removable under Sections 237(a)(2)(B)(i) and 237(a)(1)(A)(iii) of the INA, alleging that his aiding and abetting conviction was a drug crime, and that it also constituted an aggravated felony.[4] *See* 8 U.S.C. §§ 1227(a)(2)(B)(i), 1227(a)(2)(A)(iii).

Petitioner conceded that his conviction constituted a controlled substance violation and that he was removable for that reason, but denied the aggravated felony charge and applied for cancellation of removal under Section 240A of the INA. The Immigration Judge initially agreed that Petitioner's conviction did not constitute an aggravated felony and dismissed the aggravated felony charge. J.A. 7. The Immigration Judge thus accepted Petitioner's application for cancellation of removal. R. 272-98.

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[4] The INS later added charges that Petitioner had obtained his lawful resident status illegally. Pet. App. 10a-11a. The Immigration Judge found that the evidence was insufficient to sustain these charges, and therefore held that Petitioner was not removable on this ground. Pet. App. 19a, 20a. The INS did not appeal that ruling.

While Petitioner's case was pending before the Immigration Judge, the Board of Immigration Appeals issued its decision in *In re Yanez-Garcia*. As noted above (pages 7-8), *Yanez-Garcia* altered the Board's longstanding position on whether state-law felony drug convictions are aggravated felonies for immigration purposes. After receiving briefs and hearing argument, the Immigration Judge concluded that *Yanez-Garcia* required him to follow the Eighth Circuit's decision in *Briones-Mata*, in which the court held that a state-law possession felony was a "drug trafficking crime" and an aggravated felony for purposes of the Sentencing Guidelines, even though it was not a felony under the Controlled Substances Act. Pet. App. 16a, citing 116 F.3d at 308. The Immigration Judge rejected Petitioner's argument that applying the Board's decision in *Yanez-Garcia* to Petitioner was an impermissible retroactive application of that case. Pet. App. 17a-18a.

The Immigration Judge accordingly held that Petitioner's conviction of aiding and abetting the possession of cocaine constituted an aggravated felony. Pet. App. 16a-17a. On November 22, 2002, the Immigration Judge denied Petitioner's application for cancellation of removal and entered an order of removal. *Id.*

6. The Decision Of The Board Of Immigration Appeals. The Board of Immigration Appeals affirmed in a short opinion. Pet. App. 8a. The Board found "no error in the Immigration Judge's determination that [Petitioner] has been convicted of an offense falling within the definition of aggravated felony contained in section 101(a)(43)(B) of the [INA]." *Id.* at 9a. The Board also held that the Immigration Judge had "correctly relied on" *Briones-Mata*, and that the application of *Yanez-Garcia* was "not impermissibly retroactive." *Id.*

7. The Eighth Circuit's Decision. The Eighth Circuit affirmed. Pet. App. 1a-7a. The court first

addressed its jurisdiction to hear Petitioner's appeal. Pet. App. 2a. The court noted that the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, conferred jurisdiction to review "questions of law raised in petitions for review of decisions made by the Attorney General under INA § 240A and other sections." *Id.* at 2a-3a. The court therefore concluded that it had jurisdiction to decide the appeal.

Turning to whether Petitioner's conviction constituted "illicit trafficking in a controlled substance," the court held that "the plain language of the INA, and of the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony." *Id.* at 4a. The court traced the statutory language to section 924(c)(2)'s statement that a "drug trafficking crime" is "any felony punishable under the Controlled Substances Act." *Id.*, quoting 18 U.S.C. § 924(c)(2). The court noted that under the Controlled Substances Act, "felony" is defined as "any Federal or State offense classified by applicable Federal or State Law as a felony." 21 U.S.C. § 802(13). The court thus held that "Lopez's state-law drug conviction is an aggravated felony for INA purposes." *Id.* at 5a. The court noted that its holding was in accord with the Fifth Circuit, but conflicted with the Second, Third, and Ninth Circuits. *Id.* at 4a-5a. The court also rejected Petitioner's argument that applying *Briones-Mata*, rather than the BIA's decisions prior to *Yanez-Garcia*, was an impermissible retroactive application of a new rule. *Id.* at 6a.

This Court granted the petition for a writ of certiorari on April 3, 2006.[5]

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[5] The government deported Petitioner to Mexico on January 4, 2006. Resp. to Cert. Pet. at 6. The case is not moot, because if Petitioner prevails before this Court and his application for (...continued)

SUMMARY OF THE ARGUMENT

1. "[I]llicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)" is an "aggravated felony" for purposes of the immigration laws. 8 U.S.C. § 1101(a)(43)(B). "Illicit trafficking" cannot naturally be said to include simple possession of a small amount of a controlled substance. *Cf. Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004) (the term "crime of violence in 8 U.S.C. § 1101(a)(43)(F) "cannot be said naturally to include DUI offenses").

Section 924(c) of title 18 is a criminal statute that provides an additional term of imprisonment for individuals who use or carry a firearm during a drug trafficking crime "for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). For purposes of section 924(c), "'drug trafficking crime' means any felony punishable under the Controlled Substances Act" or two other federal criminal statutes. 18 U.S.C. § 924(c)(2).

The text of section 924 indicates that the term "drug trafficking crime" is limited to federal felonies. First, a drug trafficking crime must be a crime "for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1). *See United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (by using this language, Congress "expressly limited the phrase 'any crime' to only federal crimes."). Second, section 924(c) provides for punishment "in addition to the punishment provided for" the drug trafficking crime. *Id.* at 4. Third, when

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discretionary cancellation of removal is granted, he will be allowed to return to the United States. *See* Br. of Respondent (Acquiesence) at 6 n.5.

Congress wished to include state offenses in other provisions of section 924, it expressly referred to them. Thus, subsections (e), (g), and (k) of section 924 replicate the language of subsection (c) ("conduct that is punishable under" or "an offense under" the Controlled Substances Act and the two other federal statutes specified in subsection (c)), but they also refer separately to conduct that violates state law. *See* 18 U.S.C. §§ 924(g) ("conduct which . . . violates any State law relating to any controlled substance"; *id.* § 924(k) ("conduct that . . . violates any law of a State related to any controlled substance"); *id.* § 924(e) ("an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance").

The phrase "felony punishable under the Controlled Substances Act" does not require an actual conviction, but it does require proof that the defendant in fact violated one of the felony provisions of the federal statute. A state felony conviction is not itself "punishable under" the federal Controlled Substances Act. Federal and state law may punish the same conduct, but it is not a federal crime to be convicted of a state crime.

The definition of "felony" in title 21 does not apply to the term "felony" in 18 U.S.C. § 924(c). Section 924(c) does not incorporate that definition. Moreover, the INA cross-references a provision of title 18, not title 21, to define "drug trafficking crime." Title 18, in turn, classifies federal crimes as felonies or misdemeanors based upon the maximum term of imprisonment. *See* 18 U.S.C. § 3559(a). In addition, the definition of "felony" in 21 U.S.C. § 802(13) is expressly limited to uses of the term "in this title." And even within title 21, the definition does not apply to offenses defined by the Controlled Substances Act (which are governed by the title 18 classification system), but only to sentencing enhancements for repeat offenders.

Section 1101(a)(43)'s provision that the term "aggravated felony" applies to an offense "described in" paragraph (43) "whether in violation of Federal or State law" does not alter the descriptions of the offenses in the preceding provisions of paragraph (43). Thus, "illicit trafficking" includes state as well as federal trafficking offenses, but state law cannot alter or expand the description of "illicit trafficking." Similarly, a state conviction may be a "drug trafficking crime," but only if it fits the description of such an offense, *i.e.*, only if it is a felony under one of the three specified federal drug statutes. A first offense of simple possession of cocaine is not a felony violation of any of the three federal statutes, and therefore it is not a "drug trafficking crime."

Further textual confirmation of this interpretation is found in the provision that a "single offense involving possession for one's own use of 30 grams or less of marijuana" is not a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i). It is extremely unlikely that Congress intended to authorize individual States to negate this provision by classifying simple possession of a small amount of marijuana as a felony, thereby rendering individuals convicted of a single offense of simple possession of marijuana not only deportable but subject to mandatory deportation and other draconian consequences as "aggravated felons."

2. The legislative history supports this interpretation of the statutory text. Prior to 1988, 18 U.S.C. 924(c) defined a "drug trafficking crime" as a felony violation of federal law involving distribution, manufacturing, or importation of controlled substances. The provision adopting the current definition was entitled "Clarification of Definition of Drug Trafficking Crimes," and the legislative history explains that the purpose of the amendment was to clarify that possession with intent to distribute a controlled substance, as well as attempts and conspiracies, are drug trafficking crimes. There is no

indication that Congress intended to expand the definition of "drug trafficking crime" to include state offenses that are neither trafficking offenses nor federal felonies.

In addition, Congress initially defined "aggravated felony" in the INA to include only drug trafficking crimes as defined in section 924(c). In 1990, Congress amended the aggravated felony provision to provide that "illicit trafficking" is an aggravated felony, and to specify that an offense described in section 1101(a)(43) is an aggravated felony "whether in violation of Federal or State law." The legislative history explains that these amendments were intended to extend the definition of aggravated felony in accordance with a decision of the BIA holding that "aggravated felony" includes state convictions for offenses analogous to offenses under the Controlled Substances Act. The amendments indicate Congress's understanding that a state conviction for a non-trafficking offense that is a misdemeanor under federal law is not a "drug trafficking offense" for purposes of section 924(c) or the INA.

3. Several established canons of construction also support this interpretation of the statutory text. First, federal immigration laws should be interpreted to accord uniform treatment to noncitizens. Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3385 (1986). The court of appeals' interpretation leads to highly nonuniform treatment based on differences in state drug laws that likely arose without consideration of their potential immigration consequences. Second, ambiguities in immigration statutes are resolved against deportation. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 (1987). Finally, ambiguities in criminal statutes—including criminal statutes with both criminal and noncriminal applications—are resolved in favor of lenity. *Leocal*, 543 U.S. at 12.

ARGUMENT

I. The Statutory Language Provides That Aggravated Drug Felonies Must Involve Illicit Trafficking Or Be Felonies Under Federal Law.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004), quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Congress provided in section 101(a)(43) of the INA that the term "aggravated felony" means (among other offenses) "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) of title 18, in turn, provides that "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*)." 18 U.S.C. § 924(c)(2). Section 101(a)(43) of the INA further provides that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43). Here, Petitioner's plea to aiding and abetting possession of a controlled substance was not "illicit trafficking." Nor was it a "drug trafficking crime" under section 924(c). As the language and function of that provision show, it applies only to federal felonies. Petitioner's offense was a non-trafficking misdemeanor under federal law, and therefore it was not an aggravated felony under the INA.

A. Simple Possession Of A Controlled Substance Is Not "Illicit Trafficking In A Controlled Substance."

Congress's definition of a drug-related "aggravated felony"—"illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)," 8 U.S.C. § 1101(a)(43)(B)—plainly includes some drug crimes and excludes others. Specifically, it is "illicit trafficking" and "drug trafficking crime[s]" that "Congress sought to distinguish for heightened punishment [from] other crimes." *Leocal*, 543 U.S. at 11.

The statutory term "illicit trafficking" is not defined in the INA. The ordinary meaning of "traffic" is "[t]o trade or deal in goods esp. illicit drugs or other contraband." Black's Law Dictionary 1534 (8th ed. 2004). *See also* Webster's Third New Int'l Dictionary 2423 (1993) ("traffic" means "to engage in commercial activity; buy and sell regularly"); American Heritage Dictionary 1898 (3d ed. 1996) ("traffic" means "[t]he commercial exchange of goods; trade"). "Trafficking" thus connotes commercial activity, such as trading or dealing.

Simple possession of a controlled substance does not fall within the ordinary meaning of "illicit trafficking." "Possession" is "[t]he fact of having or holding property in one's power; the exercise of dominion over property." Black's Law Dictionary 1201. Possession of a controlled substance, without more, does not involve commercial activity and thus falls outside the ordinary meaning of "illicit trafficking." *See Urena-Ramirez* v. *Ashcroft*, 341 F.3d 51, 57 (1st Cir. 2003) ("Courts define 'illicit trafficking' as illegally 'trading, selling or dealing' in specified goods."); *Kuhali* v. *Reno*, 266 F.3d 93, 108 (2d Cir. 2001) (distinction between illicit trafficking and simple possession "comports well with the legal and everyday usages of that term"); *In re Davis*, 20 I. & N.

Dec. 536, 541 & n.5 (B.I.A. 1992) ("Essential to the term [trafficking] in this sense is its business or merchant nature, the trading or dealing of goods"; there is no trafficking if "the illegal substance was intended for personal use."). *See also* 21 U.S.C. § 862 (describing "drug traffickers" as "[a]ny individual who is convicted of any Federal or State offense consisting of distribution of controlled substances," and "drug possessors" as "[a]ny individual who is convicted of any Federal or State offense involving the possession of a controlled substance").

Indeed, it was established more than 50 years ago that the term "illicit traffic in narcotic drugs" in the immigration laws does not include simple possession offenses. *See In re L___*, 5 I. & N. Dec. 169, 171-72 (B.I.A. 1953) ("[A] conviction solely for possession, without more, . . . does not constitute a conviction of illicit traffic in narcotic drugs.") (interpreting 8 U.S.C. § 1182(a)(23) (1952). No court of appeals has held, and the government has not argued, that a conviction for simple possession of a controlled substance falls within the ordinary meaning of "illicit trafficking."

In *Leocal*, the Court faced a similar question of statutory construction: whether a drunk driving offense is a "crime of violence" (and therefore an aggravated felony) under section 101(a)(43)(F) of the INA. 543 U.S. at 3. The Court held that the ordinary meaning of "crime of violence" "cannot be said naturally to include DUI offenses." *Id.* In reaching that conclusion, the Court observed that "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* at 11. Similarly, in this case, the Court ultimately is determining whether Petitioner's crime is "illicit trafficking in a controlled substance." And just as the phrase "crime of violence" cannot be said naturally to include DUI offenses, the phrase "illicit trafficking in a controlled substance" cannot be said naturally to include simple possession offenses.

Congress defined a drug-related aggravated felony not simply as "illicit trafficking in a controlled substance," but as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), *including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).*" 8 U.S.C. § 1101(a)(43)(B) (emphasis added). The phrase "drug trafficking crime" repeats the term "trafficking," which of course has the same ordinary meaning as it does in the phrase "illicit trafficking." But rather than leaving the term "drug trafficking crime" undefined, Congress specified that it is defined by 18 U.S.C. § 924(c). The issue in this case thus reduces to whether Petitioner's state drug conviction is a "drug trafficking crime" as that term is defined in section 924(c).[6]

B. The Definition Of "Drug Trafficking Crime" In Section 924(c) Is Limited To Federal Felonies.

Section 924 of title 18 is a criminal statute, not an immigration statute. It defines and establishes punishments for various offenses involving firearms or ammunition. Section 924(c) provides that a person who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States" "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" be sentenced to an additional specified term of imprisonment. 18 U.S.C. § 924(c). Congress provided

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[6] The argument that "drug trafficking crime" should be construed according to its ordinary meaning to exclude non-trafficking offenses, including non-trafficking offenses that are punished as felonies under the Controlled Substances Act, is developed in the briefs of several of the *amici curiae* supporting Petitioner. *See, e.g.*, Br. of Immigrant Defense Project *et al.*

that "no term of imprisonment imposed" under section 924(c) "shall run concurrently with any other term of imprisonment imposed on the person." *Id.* Section 924(c)(2) provides that, "[f]or purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*)." 18 U.S.C. § 924(c)(2). For several reasons, the term "drug trafficking crime" in section 924(c) is limited to federal crimes; state offenses are not "drug trafficking crimes" for purposes of section 924(c).

1. The Language And Structure Of Section 924(c) Limit The Definition Of "Drug-Trafficking Crime" To Federal Crimes.

Section 924(c) provides for an additional term of imprisonment when an individual uses or carries a firearm during and in relation to a drug trafficking crime "for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). In *United States* v. *Gonzales*, 520 U.S. 1 (1997), this Court noted that "Congress explicitly limited the scope of the phrase 'any crime of violence or drug trafficking crime' to those 'for which [a defendant] may be prosecuted in a court of the United States." *Id.* at 5. The Court construed this statutory language as "expressly" limiting "the phrase 'any crime' to only federal crimes." *Id.; see also* Br. of United States in *United States* v. *Gonzales*, at 15 ("The first sentence [of section 924(c)] makes clear that the statute does not reach using or carrying a firearm during a state-law violation.").

This conclusion is confirmed by other portions of the statutory text and the structure of the statute. Section 924(c) provides for punishment "in addition to the

punishment provided for such crime of violence or drug trafficking crime," and further specifies that no term of imprisonment imposed under section 924(c) "shall run concurrently with any other term of imprisonment . . . including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. §§ 924(c)(1)(A), (D)(ii). This language indicates that federal courts impose sentences under section 924(c) on top of ("in addition to") a sentence for the crime of violence or drug trafficking crime. Because federal courts sentence defendants for federal offenses, not state offenses, this language provides a further indication that, for purposes of section 924(c), "drug trafficking crime" is limited to a federal drug crime.

Moreover, Congress specifically referred to state offenses in section 924 when it intended to include them. For example, section 924(g) proscribes traveling interstate to transfer a firearm with the intent to engage in specified "conduct." As in section 924(c), the prohibited "conduct" is defined as that which is "punishable under the Controlled Substances Act, . . . the Controlled Substances Import and Export Act, . . . or the Maritime Drug Law Enforcement Act." 18 U.S.C. § 924(g). But subsection (g), unlike subsection (c), also applies to "conduct that violates any State law relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802)." *Id.* at § 924(g)(2)-(3). Section 924(k), which prohibits smuggling or knowingly bringing a firearm into the United States, parallels the language of subsection (g) and includes an express reference to conduct that violates state law. 18 U.S.C. § 924(k).

In addition, section 924(e)(1) prescribes a minimum punishment for any person who violates section 922(g) "and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent

felony or serious drug offense." 18 U.S.C. § 924(e)(1). Section 924(e)(2) defines "serious drug offense" to include not only "an offense under the Controlled Substances Act . . . the Controlled Substances Import and Export Act . . ., or the Maritime Drug Law Enforcement Act . . . for which a maximum term of imprisonment of ten years or more is prescribed by law," but also "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i)-(ii).

When "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Congress's inclusion of express references to state offenses in sections 924(e), (g), and (k), and its omission of any such reference in section 924(c), indicates that a "drug trafficking crime" (*i.e.*, a "felony punishable under the Controlled Substances Act" or the two other federal drug statutes) refers solely to felony violations of federal law.[7]

Accordingly, the definition of "drug trafficking offense" in section 924(c) is limited to federal offenses. Petitioner has not located a single case in which the government prosecuted an individual under section 924(c)

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[7] Congress enacted the current definition of "drug trafficking crime" in section 924(c) at the same time it enacted section 924(g) (originally section 924(f)). *See* Anti Drug-Abuse Act of 1988, Pub. L. No. 100-690, § 6211, 102 Stat 4181, 4359.

based on the carrying or use of a firearm during a state-law felony.[8]

2. A State Conviction, As Opposed To The Conduct Underlying The Conviction, Is Not "Punishable" Under The Federal Drug Laws.

Section 924(c) defines a "drug trafficking crime" as a "felony punishable under the Controlled Substances Act" or two other federal drug laws. In ordinary usage, conduct is "punishable under" a statute if the statute prohibits the conduct and prescribes a punishment for engaging in the conduct. Congress's use of the term "punishable" thus indicates that a defendant may be convicted under section 924(c) without actually being convicted of a felony violation of the Controlled Substances Act, so long as the government proves that the defendant in fact violated that Act. *See United States* v. *Rodriquez-Moreno*, 526 U.S. 275, 280 (1999) (To prove a violation of section 924(c), the government was required to show that the defendant committed "all the acts necessary to be subject to punishment for kidnaping"); *United States* v. *Hopkins*, 310 F.3d 145, 152 (4th Cir. 2002) (although a conviction under section 924(c) does not require that the defendant be convicted of the predicate offense, all the elements of the offense must be proved

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[8] In one case, the government brought a prosecution under 18 U.S.C. § 924(h) (which prohibits "transferring a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3) or drug trafficking crime (as defined in subsection (c)(2)) alleging that the crime of violence was a state felony. The district court dismissed the indictment and the court of appeals affirmed. *United States* v. *McLemore*, 28 F.3d 1160, 1165 (11th Cir. 1994) (holding that "crime of violence" in Section 924(h) does not include convictions obtained under state law).

and found beyond a reasonable doubt); *see generally Sedima* v. *Imrex Co.*, 473 U.S. 479, 488 (1985) (RICO predicate acts, which must be "punishable under various criminal statutes" do not require a conviction, but must be "subject to criminal sanction.").

It does not follow, however, that a state felony conviction is itself "punishable under" the Controlled Substances Act or the other federal drug laws. As the Seventh Circuit has observed, "State crimes, as distinct from the acts constituting the crimes, are not usually punished by federal law." *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 534 (2006) (Posner, J.) Federal law and state law may and frequently do punish the same conduct, such as bank robbery. But federal law does not provide that "anyone who is convicted of bank robbery in state court is guilty of a federal offense." *Id.* (citing 18 U.S.C. § 2113). Consequently, one would not ordinarily say that a state felony conviction is itself punishable under the Controlled Substances Act. "The Controlled Substances Act does not purport to punish state drug felonies," although federal and state law may punish the same conduct. *Id.* A state felony conviction may be used to enhance the federal sentence of a defendant convicted of a violation of the Controlled Substances Act, as the Seventh Circuit noted. *Id.*, citing 21 U.S.C. 841(b)(1). But that is quite different from treating a state felony conviction as itself a violation of federal law.

3. Section 924(c) Of Title 18 Is Not Governed By The Definition Of "Felony" In Title 21.

The court of appeals construed the phrase "any felony punishable under the Controlled Substances Act" to mean "any felony, so long as it is punishable under the Controlled Substances Act as a felony or a misdemeanor." The court reached this result by observing that the Controlled Substances Act defines "felony" as "any

Federal or State offense classified by applicable Federal or State law as a felony," 21 U.S.C. § 802(13), and holding that this definition governs the meaning of "felony" in 18 U.S.C. § 924(c). *See* Pet. App. 4a; *Briones-Mata*, 116 F.3d at 309. The court's reliance on this provision of title 21 was misplaced for several reasons.

First, section 924(c)(2) does not incorporate the Controlled Substances Act's definition of "felony." Section 924(c) refers to a felony "punishable under" the Controlled Substances Act, not a felony "as defined in" that Act. Second, section 101 of the INA defines the term "drug trafficking crime" by referencing title 18 rather than the Controlled Substances Act. 8 U.S.C. § 1101(a)(43)(B). In drafting section 101, Congress readily incorporated definitions from other statutory provisions when it wished to do so. The fact that Congress did not incorporate the definition of "felony" from title 21 to define "drug trafficking crime" cuts against reading the title 21 definition into "drug trafficking crime."

Third, section 924(c) is a provision of title 18, and section 3559 of title 18 classifies federal crimes into felonies and misdemeanors depending upon the length of the authorized term of imprisonment. 18 U.S.C. § 3559(a). Thus, the most natural reading of the reference to "any felony" in 18 U.S.C. § 924(c) is that it means any felony as that term is used in title 18.

Fourth, the Controlled Substances Act specifically limits the application of its definitional provisions, including the definition of "felony," to uses of the defined terms "in this title," *i.e.*, title 21. 21 U.S.C. § 802. Moreover, the Controlled Substances Act generally does not use the term "felony" to describe offenses punishable under that Act. When the Controlled Substances Act defines particular crimes, it simply defines the applicable punishment. *See* 21 U.S.C. §§ 841-44. Those crimes are classified as misdemeanors or felonies based upon the definitions of title 18. *See id.*; 18 U.S.C. § 3559(a). The

term "felony" is used in the Controlled Substances Act to describe the circumstances in which statutory sentence enhancements for repeat offenders apply. *E.g.*, 21 U.S.C. § 841(b). Thus, crimes "punishable under" the Controlled Substances Act are themselves classified as felonies or misdemeanors based on the provisions of title 18, not on the Act's definition of "felony."[9]

For these reasons, the definition of "felony" in title 21 does not govern the meaning of the phrase "any felony punishable under the Controlled Substances Act" in 18 U.S.C. § 924(c).

C. The Description Of "Drug Trafficking Crime" Is Not Altered By The Provision That An Offense Described In The INA Is An Aggravated Felony "Whether In Violation Of Federal Or State Law."

Section 101(a)(43) of the INA provides that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43). By its clear terms, this provision does not alter or expand the descriptions of the offenses set forth earlier in section 101(a)(43). Thus, for example, section 101(a)(43)(B) describes the offense of "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act)." An offense that fits this description is an aggravated felony, whether it is a violation of federal or state law. But the description of the offense remains unchanged: it must be "illicit trafficking in a controlled substance."

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[9] The Controlled Substances Import and Export Act and the Maritime Drug Law Enforcement Act, like the Controlled Substances Act, use the term "felony" to mandate enhanced penalties for recidivists. *See* 21 U.S.C. § 960(b); 46 U.S.C. App. §1903(g).

Similarly, the definition of "drug trafficking crime" under section 924(c) is limited to felony violations of the Controlled Substances Act and two other federal drug statutes. A state law conviction may qualify as an aggravated felony, but only if it fits the description of a "drug trafficking crime"—*i.e.*, only if it can be proved and found that the individual's conduct violates every element of a felony offense under one of the three federal drug statutes. A first offense of simple possession of cocaine is not a felony under federal law, and therefore it is not a "drug trafficking crime" under section 924(c). *See* 21 U.S.C. §§ 844(a), 960-61; 46 U.S.C. App. § 1903. That conclusion does not change if state law classifies the offense as a felony rather than a misdemeanor, because the offense is described to include only federal felonies.

D. The Court Of Appeals' Interpretation Is Inconsistent With Congress's Treatment Of Simple Possession Of Marijuana In Section 237 Of The INA.

Congress provided in section 237 of the INA that a "single offense involving possession for one's own use of 30 grams or less of marijuana" does not constitute a "controlled substances" offense for which a noncitizen may be deported. 8 U.S.C. § 1227(a)(2)(B)(i). Under the court of appeals' decision, however, an individual convicted in a state court of a first offense of simple possession of marijuana in States that classify this offense as a felony would be subject not only to deportation, but to mandatory deportation and all the additional consequences of an aggravated felony conviction: including ineligibility for asylum or citizenship and effective banishment.[10]

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[10] Some States classify a first offense of simple possession of marijuana as a felony. *E.g.*, N.D. Cent. Code § 19.03.1-23(6); Fla. Stat. § 893.13(6)(a) (possession of more than 20 grams of (...continued)

It is highly unlikely that Congress, having made a considered and explicit determination that a first offense of simple possession of marijuana should not be a basis for deportation, would have intended to define the term "aggravated felony" in such a way that persons convicted of that offense are subject to mandatory deportation and other harsh consequences. It is even more incredible that Congress would have intended to make such nonuniform treatment turn on variations in state drug laws adopted for non-immigration purposes.

II. Congress Did Not Intend To Define State Drug-Possession Felonies As Drug Trafficking Aggravated Felonies.

The relevant statutory and legislative history supports the conclusion that a drug crime is an "aggravated felony" under the INA only if it involves "illicit trafficking" or is a felony under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. In addition, the legislative history of section 924(c)(2) of title 18 reinforces the conclusion that Congress did not intend to include any state crimes, let alone all state drug possession felonies, within the definition of "drug trafficking crime."

A. The History Of Section 924(c) Indicates That Congress Did Not Intend To Define Conduct Constituting A Federal Misdemeanor As A Drug Trafficking Felony.

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marijuana is a felony in the third degree, punishable by up to 5 years under Fla. Stat. § 775.082(3)(d)). Other States define the offense as a felony, but provide a maximum of term of imprisonment of exactly one year. *E.g.*, Ariz. Rev. Stat. Ann. §§ 13-3405, 13-701 (defining possession of under 2 pounds of marijuana as a class 6 felony, punishable by one year in prison).

Prior to 1988, section 924(c) defined "drug trafficking crime" as "any felony violation of federal law involving the distribution, manufacture, or importation of any controlled substance." 18 U.S.C. § 924(c)(2) (1982 & Supp. 1986). This statutory language expressly limited drug trafficking crimes to violations of federal law. When Congress replaced this language with the current definition of "drug trafficking crime" in 1988, the new provision was entitled "Clarification of Definition of Drug Trafficking Crimes in which Use or Carrying of Firearms and Armor Piercing Ammunition is Prohibited." Pub. L. No. 100-690, § 6212, 102 Stat 4181, 4360 (1988). A "clarification," of course, is not usually understood as a radical change.

Senator Biden, the Chairman of the Senate Judiciary Committee and a principal drafter of the amendment, explained the purpose of the amendment: "The present definition of 'drug trafficking crime,' . . . covers offenses involving the distribution, manufacture, and importation of controlled substances, but does not cover either possession with intent to distribute, or attempt and conspiracy violations. The amendment makes clear that sections 924(c) and 929(a) cover all drug felonies." 134 Cong. Rec. 17360, S17,363.

Senator Biden's explanation makes perfect sense. The prior statutory language could be construed to omit possession with intent to distribute, as well as attempt and conspiracy offenses. Prior to the 1988 amendment, many defendants argued for such a narrow construction, and at least one district court agreed with them. *See United States* v. *Chaidez*, 916 F.2d 563, 565 (9th Cir. 1990) (defendant contended that "conspiracy to possess with intent to distribute does not 'involve . . . distribution,' as required by section 924(c)(2)"); *United States* v. *James*, 834 F.2d 92 (4th Cir 1987) (reversing district court holding that "[p]ossession with intent to

distribute . . . was essentially a possession offense, and thus outside Congress's intended reach").

The legislative history thus supports the conclusion that, in modifying the definition of "drug trafficking crime" in section 924(c), Congress did not intend to include state offenses within that definition, or turn over to the States the definition of what constitutes a drug-related "felony" in connection with which federal law prohibits using or carrying a firearm. Instead, Congress aimed at a more modest result: eliminating a possible ambiguity in the language of section 924(c)(2) by clarifying that the definition of "drug trafficking crime" includes federal drug felonies such as possession of a controlled substance with intent to distribute it.

B. The History Of Section 101 Of The INA Confirms That Congress Did Not Intend To Expand Section 924(c) To Include State-Law Crimes.

In addition to clarifying the definition of "drug trafficking crime" under section 924(c), the Anti-Drug Abuse Act of 1988 added the first "aggravated felony" provisions to the INA. Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70. Congress initially defined "aggravated felony" as "murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title." *Id.* The initial definition included only "drug trafficking crimes" defined by section 924(c); it did not provide that "any illicit trafficking in any controlled substance" is an aggravated felony.

Two years after the "aggravated felony" provision was first added, the Board of Immigration Appeals issued its decision in *Barrett*. 20 I. & N. Dec. 171 (B.I.A. 1990). The Board held that "the definition of 'drug trafficking crime' for purposes of determining drug-related

'aggravated felonies' within the meaning of the [INA] encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act." *Id.* at 177-78. That same year, Congress amended the definition of aggravated felony in section 101(a)(43). The Report of the House Judiciary Committee on the 1990 legislation specifically referred to the Board's decision in *Barrett*, noting that "the Board of Immigration Appeals in *Matter of Barrett* (March 6, 1990), has recently ruled" that a state drug trafficking conviction is an aggravated felony. H.R. Rep. No. 101-681 (1990). The Report states: "Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, [the Act] specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court." *Id.* Thus, the 1990 amendment extended the definition of "aggravated felony" to effectively codify the decision in *Barrett*. *See* 136 Cong. Rec. S17,106, S17,117 (Oct. 26, 1990) (Statement of Sen. Graham) (The amendments "[e]xtend the definition of aggravated felony to include aliens convicted of like State crimes, codifying a recent ruling of the Immigration Board of Appeals.").

To achieve this result, Congress made two changes to the language of section 101. First, it inserted a provision defining a drug-related aggravated felony as "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act)." Pub. L. No. 101-649 § 501, 104 Stat 4978, 5048 (1990). Second, it added a provision that the "term [aggravated felony] applies to offenses . . . whether in violation of Federal or State law." *Id.*

The two 1990 amendments work together to bring state crimes into the definition of aggravated felonies. First, the category of drug-related aggravated felonies is expanded from "any drug trafficking crime under section

924(c) of title 18" to "any illicit trafficking in any controlled substance . . . including any drug trafficking crime" under section 924(c). The definition of aggravated felony, which previously was limited to felonies "punishable under" federal law thus was expanded to include *any* "illicit trafficking." In addition, Congress specified that "any" trafficking crime included state-law offenses. If Congress had understood that the definition of "drug trafficking crime" in section 924(c) includes state drug trafficking crimes, it would not have needed to adopt an additional provision providing generally that "illicit trafficking" is an aggravated felony.

III. Canons Of Statutory Construction Support The Conclusion That A Drug Offense That Is Neither Illicit Trafficking Nor A Federal Felony Is Not An Aggravated Felony.

Several well-established rules of statutory construction also support the conclusion that a state conviction for simple possession of a controlled substance is not an aggravated felony unless it involves "illicit trafficking" or is a felony violation of federal law.

A. Immigration Statutes Are Construed To Ensure Uniform Treatment Of Immigrants.

Congress's power over immigration is "unquestionably exclusively a federal power." *De Cana* v. *Bica*, 424 U.S. 351, 354 (1976). *See also United States* v. *Wong Kim Ark*, 169 U.S. 649, 701 (1898) ("The power . . . to establish a uniform rule of naturalization, was long ago adjudged by this court to be vested exclusively in Congress."). The Constitution provides, "The Congress shall have the Power to . . . establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8. Writing in The Federalist, Alexander Hamilton stated that the power is one of the few "EXCLUSIVELY delegated to the United States." The Federalist No. 32. Hamilton explained that the immigration power is exclusive precisely because it is

the power to establish uniform rules: The power "to establish a UNIFORM RULE of naturalization . . . must necessarily be exclusive; because if each State had a power to prescribe a DISTINCT RULE there could not be a Uniform Rule." *Id.*

Congress's exclusive power to "establish a uniform Rule of Naturalization" has given rise to a well-settled policy that federal immigration and naturalization laws should be applied uniformly throughout the country. Congress itself has endorsed this policy, declaring: "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 115, 100 Stat. 3559, 3384 (1986). The federal courts have likewise recognized that immigration laws should be interpreted and applied uniformly. *See, e.g., Jaramillo* v. *INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) ("The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide . . . ."); *Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen."); *Cazarez-Gutierrez*, 382 F.3d at 912; *Gerbier* v. *Holmes*, 280 F.3d 297, 299 (3d Cir. 2002); *Aguirre*, 79 F.3d at 317.

The policy favoring uniform application of the immigration laws supports an interpretation of the statutory language that makes similarly-situated noncitizens subject to the same rules for asylum, cancellation of removal, and naturalization. Absent the clearest statutory language to the contrary, the Court should not conclude that Congress adopted a provision

that defeats Congress's own recognized goal of uniformity, and does so by effectively ceding a substantial part of its exclusive immigration power to the States. It is unlikely that Congress would delegate to individual States effective power to banish lawful permanent residents, and it is particularly unlikely that Congress intended States to exercise this power through non-immigration laws that probably were adopted without any consideration of their immigration consequences.

The court of appeals' interpretation has all those unlikely consequences. If a State classifies simple possession of a controlled substance as a felony rather than a misdemeanor, then under the court of appeals' interpretation noncitizens convicted of simple possession offenses in that State are subject to mandatory deportation, are permanently ineligible to become naturalized citizens, and are effectively banished. *See* 8 U.S.C. § 1427(a)(3). Noncitizens convicted of the same drug offense under federal law, or in States that classify the offense as a misdemeanor rather than a felony, are not subject to any of these immigration consequences.

Moreover, it is open to question whether Congress even has the power to adopt such an arrangement. By its terms, the Constitution grants Congress authority to "establish a uniform Rule." U.S. Const. art. I, § 8. It does not grant Congress authority to establish a nonuniform rule. The court of appeals' interpretation of section 101 thus may render that provision unconstitutional. *See* Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696 (1999) (arguing that the Naturalization Clause limits Congress's power to enact nonuniform immigration laws, and that making the definition of an "aggravated felony" turn on varying state laws is unconstitutional). When interpreting a statute, this Court prefers an interpretation that avoids serious constitutional issues. *Clark* v. *Martinez*, 543 U.S. 371,

380-81 (2005). That canon also weighs against the court of appeals' interpretation here.[11]

B. Ambiguities In Deportation Statutes Are Resolved Against Deportation.

Section 101 of the INA is also subject to the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). The Court has observed that "deportation is a drastic measure" that is "at times the equivalent of banishment or exile." *Fong Haw Tam* v. *Phelan*, 333 U.S. 6, 10 (1948). "It is the forfeiture for misconduct of a residence in this country," a "penalty." *Id.* While "[t]o construe this statutory provision less generously to the alien might find support in logic," where "the stakes are considerable for the individual, [the Court] will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* at 10. *See also INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964) (holding that if a matter of statutory construction were in doubt "we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the [noncitizen] petitioner."). This canon of construction also favors Petitioner's construction of the statutory language and cuts against the interpretation of the court of appeals.[12]

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[11] As explained in the amicus brief of Human Rights First, the statutory language should also be interpreted to avoid a possible conflict with the treaty obligations of the United States. *See* Amicus Br. of Human Rights First at 17-25.

[12] The government's interpretation can result in severe hardship in individual cases. *See* Amicus Brief of Juvenile Law Center, *et al.*

The government's approach to the aggravated felony provisions is very nearly the opposite of resolving ambiguities in favor of the alien. As the Seventh Circuit, speaking through Judge Posner, recently observed: "The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzalez-Gomez*, 441 F.3d at 535. For example, the government takes the position that the definition of "sexual abuse of a minor," which is an aggravated felony under section 101(a)(43), is a matter of federal law rather than state law, and that "immigration authorities can redefine" a state misdemeanor conviction "as a felony, indeed as an aggravated felony." *Id.* (citations omitted). *See also United States* v. *Amaya-Portillo*, 423 F.3d 427, 431-32 (4th Cir. 2005) (rejecting government argument that a state drug misdemeanor is an aggravated felony if it is punishable by more than one year's imprisonment).

C. Federal Crimes Are Presumed To Have A Uniform Definition, And Ambiguities Are Resolved In Favor Of Lenity.

In interpreting federal criminal statutes such as section 924(c), the Court applies a presumption that Congress intends to adopt uniform federal definitions of offenses, and not to allow punishment for identical conduct to turn on variations in state law. *See Taylor* v. *United States*, 495 U.S. 575, 590-92 (1990) (interpreting "burglary" in 18 U.S.C. 924(e); *Jerome* v. *United States*, 318 U.S. 101, 104 (1943) ("[I]n the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.").

Moreover, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (marks omitted), quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). The rule of lenity is founded on the policy of

fair warning as to what conduct is prohibited by the criminal laws, and the policy that legislatures, rather than courts, should determine what conduct is prohibited. *See id.* at 347-48 (When a "choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (quoting *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222 (1952))).

The rule of lenity applies in this case. Section 924(c) is a criminal statute. In *Leocal*, as here, the Court interpreted a phrase in a criminal statute that was incorporated into the INA's definition of "aggravated felony." The phrase at issue in *Leocal* was "crime of violence" in section 16 of title 18; here the phrase is "drug trafficking crime" in section 924(c) of that title. In *Leocal*, the Court found that the text was not ambiguous, but that "[e]ven if [the statute] lacked clarity. . . [the Court] would be constrained to interpret any ambiguity in the statute in petitioner's favor." 543 U.S. at 12. The Court observed that while it was interpreting the statute "in the deportation context, [it] is a criminal statute, and it has both criminal and noncriminal applications." *Id.* Accordingly, the Court held, "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Id.* The same is true here. To the extent that section 924(c)'s definition of "drug trafficking crime" lacks clarity, the Court is "constrained to interpret any ambiguity in petitioner's favor." *Id.*

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Provisions of the Immigration and Nationalization Act (8 U.S.C. § 1101 *et seq.*)

§ 1101. Definitions

(a)

* * *

(43) The term "aggravated felony" means—

* * *

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

§ 1227. General classes of deportable aliens

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses.

(A) General crimes.

* * *

(iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * *

(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * *

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * *

Provisions of Title 18, U.S. Code

§ 924. Penalties

* * *

(c)

(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate

that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * *

(e) (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

* * *

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

* * *

§ 3559. Sentencing classification of offenses

(a) Classification. An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is--

(1) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(2) twenty-five years or more, as a Class B felony;

(3) less than twenty-five years but ten or more years, as a Class C felony;

(4) less than ten years but five or more years, as a Class D felony;

(5) less than five years but more than one year, as a Class E felony;

(6) one year or less but more than six months, as a Class A misdemeanor;

(7) six months or less but more than thirty days, as a Class B misdemeanor;

(8) thirty days or less but more than five days, as a Class C misdemeanor; or

(9) five days or less, or if no imprisonment is authorized, as an infraction.

(b) Effect of classification. Except as provided in subsection (c), an offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation, except that, the maximum term of imprisonment is the term authorized by the law describing the offense.

Provisions of the Controlled Substances Act
(21 U.S.C. § 801 *et seq.*)

§ 802. Definitions

As used in this title:

* * *

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

* * *

(44) The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

* * *

§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list *I* chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title or section 1008 of title III if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or

phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $ 1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $ 2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $ 5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $ 1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not

more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

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Nos. 05-547 and 05-7664

In the Supreme Court of the United States

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

REYMUNDO TOLEDO-FLORES

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND EIGHTH CIRCUITS

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QUESTION PRESENTED

The Immigration and Nationality Act attaches a variety of consequences to an alien's commission of an "aggravated felony." That Act defines "aggravated felony" to include "a drug trafficking crime (as defined in section 924(c) of title 18)"—which, in turn, defines the phrase to mean "any felony punishable under the Controlled Substances Act" (18 U.S.C. 924(c)(2))—"whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). The federal Sentencing Guidelines adopt that same definition of "aggravated felony." U.S.S.G. § 2L1.2(b)(1)(C) and comment. (n.3(A)). The question presented is:

Whether a state conviction for a controlled substance offense that is a felony under state law, and that is punishable under the Controlled Substances Act, albeit generally as a misdemeanor, qualifies as an "aggravated felony" under the Immigration and Nationality Act.

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In the Supreme Court of the United States

No. 05-547

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

No. 05-7664

REYMUNDO TOLEDO-FLORES

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in No. 05-547 (05-547 Pet. App. 1a-7a) is reported at 417 F.3d 934. The decisions of the Board of Immigration Appeals (05-547 Pet. App. 8a-9a) and of the immigration judge (05-547 Pet. App. 10a-20a) in that case are unreported. The opinion of the court of appeals in No. 05-7664 (05-7664 J.A. 20-21) is not published in the *Federal Reporter*, but is *reprinted in* 149 Fed. Appx. 241.

JURISDICTION

The court of appeals entered its judgment in No. 05-547 on August 9, 2005. The petition for a writ of certiorari was filed on October 31, 2005. The court of appeals entered its judg-

ment in No. 05-7664 on August 17, 2005. The petition for a writ of certiorari was filed on November 15, 2005. The Court granted certiorari in both cases on April 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix B, *infra*, and at 05-547 Pet. Br. App. 1a-11a.

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), an alien who is convicted of an "aggravated felony," as defined in 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). An alien also may be removed if he is convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)," unless it was a "single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i).

Conviction of an "aggravated felony" limits the potential forms of relief from removal that are available to an alien. An aggravated felony conviction renders a lawful permanent resident ineligible to apply for cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C), or the discretionary relief of asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i). An aggravated felony conviction does not disqualify an alien from withholding of removal, unless the term of imprisonment was five years or more and thus was "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii).[1]

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[1] An alien with an aggravated felony conviction may obtain deferral of removal, but not withholding of removal, under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85. See 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Furthermore,

In addition, conviction of an aggravated felony can affect an illegal alien's sentence for a recidivist illegal entry offense. It is a federal crime for an alien to enter the United States without authorization or proper inspection, or by providing false or misleading information to federal officials. 8 U.S.C. 1325(a). The maximum term of imprisonment for a first offense is six months in prison, but is two years for subsequent offenses. *Ibid.*[2] The United States Sentencing Guidelines authorize an eight-level upward adjustment in a defendant's offense level for illegal entry if the defendant was convicted of an "aggravated felony" before a prior removal from the United States. See U.S.S.G. § 2L1.2(b)(1)(C). In so doing, the Sentencing Guidelines adopt the INA's definition of "aggravated felony." *Id.* § 2L1.2, comment. (n.3(A)).[3]

b. The INA defines an "aggravated felony" by reference to a list of twenty-one categories of criminal offenses. Any offense "described in" that definition, "whether in violation of Federal or State law," is an aggravated felony. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). Any such offense "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years" is also an aggravated felony. *Ibid.*

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aliens convicted of an aggravated felony are barred from seeking readmission following removal, but that bar is subject to waiver by the Attorney General. 8 U.S.C. 1182(a)(9)(A)(i) and (ii). Such aliens are also precluded from establishing "good moral character," 8 U.S.C. 1101(f)(8), and thus from being granted voluntary departure, 8 U.S.C. 1229c(b)(1)(B).

[2] Illegal reentry following a prior removal is also a criminal offense under 8 U.S.C. 1326. The maximum sentence is two years, unless the prior removal was subsequent to a conviction for an aggravated felony, which raises the maximum sentence to 20 years of imprisonment, 18 U.S.C. 1326(a) and (b)(2).

[3] Because the Sentencing Guidelines simply incorporate the INA's definition of "aggravated felony," Section 1101(a)(43)'s meaning in immigration law applies equally to sentencing proceedings.

That definition of "aggravated felony" includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Section 924(c)(2) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."[4]

Title 18 classifies a federal crime as a "felony" if "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559 (2000 & Supp. III 2003). The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, defines "felony" generally as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). That Act further defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44), as amended by the Anabolic Steroid Act of 2004, Pub. L. No. 108-358, § 2(a)(2), 118 Stat. 1663.

2. Petitioner Lopez is a native and citizen of Mexico who entered the United States illegally, but subsequently adjusted his status to that of lawful permanent resident. 05-547 Pet. App. 1a-2a, 11a. In 1997, after being granted lawful permanent resident status, Lopez was indicted in a South Dakota state court on one count of possessing cocaine, one count of distributing cocaine, and one count of conspiracy to distribute cocaine. 05-547 J.A. 41-43. Lopez ultimately pleaded guilty to aiding and abetting the possession of cocaine. 05-547 Pet. App.

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[4] Because these cases involve offenses that are punishable under the Controlled Substances Act, this brief's recitation of Section 924(c)(2)'s definitional language generally omits the other two laws for the sake of brevity.

13a; 05-547 J.A. 31-32. Under South Dakota law, Lopez's aiding and abetting offense was a felony punishable by up to five years of imprisonment. See S.D. Codified Laws § 22-42-5 (Michie 1988); *id.* § 22-6-1(7) (1988 & Supp. 1997). Also under South Dakota law, a person found guilty of aiding and abetting an offense "is legally accountable[] as a principal to the crime." *Id.* § 22-3-3 (West Supp. 2006); see *id.* § 22-3-3 (Michie 1988). Lopez was sentenced to five years of imprisonment, of which he served 15 months. 05-547 Pet. App. 14a; 05-547 J.A. 32.

The Immigration and Naturalization Service subsequently charged Lopez with being subject to removal based on his conviction of a controlled substance offense and an aggravated felony. 05-547 Pet. App. 12a.[5] With respect to the circumstances of his offense, Lopez testified at his immigration hearing that he "knew where you could get drugs in Huron at that time," that "he referred [Juan] Valdez to someone who did sell drugs," that he "helped him out to obtain the drugs," and that he had received money from Valdez. *Id.* at 13a; Admin. Rec. 98; see *ibid.* (Lopez states that he was "involved in the sale of illegal drugs," but "[o]nly that [one] time").

An immigration judge sustained both charges of removability. 05-547 Pet. App. 10a-20a. The immigration judge ruled first (*id.* at 16a) that Lopez was removable based on the controlled substance violation, a charge that was "not disputed." Relying on controlling precedent from the Board of Immigration Appeals (Board), the immigration judge further ruled that Lopez's state felony controlled substance offense constituted an aggravated felony because it was a drug trafficking crime under 8 U.S.C. 1101(a)(43)(B). See 05-547 Pet. App. 16a (citing *In re Yanez-Garcia*, 23 I. & N. Dec. 390

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[5] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

(B.I.A. 2002)). Finally, the immigration judge ruled that Lopez's conviction of an aggravated felony statutorily disqualified him from obtaining the discretionary relief of cancellation of removal. 05-547 Pet. App. 20a. The Board affirmed in a brief opinion. 05-547 Pet. App. 8a-9a.

The court of appeals affirmed. 05-547 Pet. App. 1a-7a. As relevant here, the court held that Lopez's felony conviction constituted an "aggravated felony." *Id.* at 4a. Following its prior decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997) (per curiam), the court held that the "plain language" of Section 1101(a)(43) and the criminal law provisions it incorporates establish that "any felony punishable under the Controlled Substances Act," "under either state or federal law," is an aggravated felony. 05-547 Pet. App. 4a. Because Lopez's conviction was for a felony offense and was for conduct that was independently punishable under the Controlled Substances Act, the court held that it qualified as an "aggravated felony" (*id.* at 5a), which rendered Lopez ineligible for cancellation of removal (*id.* at 7a).

On January 4, 2006, Lopez was removed to Mexico, and he continues to pursue his claim for cancellation of removal from there. See 05-547 Gov't Pet. Stage Br. 6 n.5.

3. Petitioner Toledo-Flores is a native and citizen of Mexico who entered the United States illegally in February 2004, and was charged with illegal entry under 8 U.S.C. 1325. See 05-7664 J.A. 12-13. Toledo-Flores's immigration record revealed 15 prior illegal entries, including two prior federal convictions for illegal entry. *Id.* at 5, 14, 16-17. In fact, he had remained in Mexico for only one week between a prior deportation and his illegal entry in February 2004. *Id.* at 12-13. Toledo-Flores also has an extensive record of criminal conduct in the United States. He has state-court convictions for criminal mischief, assault, and driving while intoxicated. 05-7664 J.A. 16. In April 2002, Toledo-Flores was convicted in Texas

state court of possessing less than one gram of cocaine. *Id.* at 21; 05-7664 Pet. Br. 3. Under Texas law, that offense is a felony punishable by up to two years of imprisonment. See Tex. Health & Safety Code Ann. § 481.102 (West Supp. 2006); *id.* § 481.115 (2003); Tex. Penal Code Ann. § 12.35 (West 2003). The Texas court sentenced Toledo-Flores to seven months of imprisonment. Gov't C.A. Br. 4.

In sentencing Toledo-Flores for his illegal entry offense, the district court applied the Sentencing Guidelines' eight-level enhancement for a prior conviction of an aggravated felony, U.S.S.G. § 2L1.2(b)(1)(C), based on Toledo-Flores's felony drug conviction in Texas. See 05-7664 J.A. 21. The court sentenced Toledo-Flores to two years of imprisonment, to be followed by one year of supervised release. *Id.* at 1.

The court of appeals affirmed. 05-7664 J.A. 20-21. The court held that Congress had made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." *Id.* at 21 (quoting *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir.), cert. denied, 534 U.S. 935 (2001)). Applying Fifth Circuit precedent, the court explained that Toledo-Flores's "prior conviction for a state drug offense * * * qualif[ied] as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) [because] it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law." *Id.* at 21.

Toledo-Flores completed the term of imprisonment under his federal sentence on April 21, 2006, and was removed to Mexico. He will remain on inactive supervised release until April 20, 2007.

SUMMARY OF ARGUMENT

I. Petitioner Toledo-Flores's case is moot. His sole challenge is to the aggravated-felony enhancement of his term of imprisonment. He has now completed that prison term and has been removed from the United States. Accordingly, a ruling in his favor would have no practical effect. While he remains on supervised release, his supervision is inactive, imposes no constraints on his liberty, and, in any event, would not be affected by a ruling that the aggravated-felony enhancement was in error.

II. The plain text of the relevant statutory provisions makes state-law controlled substance felonies "aggravated felonies" under the INA. The operative language directs that "any felony" that is "punishable under the Controlled Substances Act" is a "drug trafficking crime," and thus an aggravated felony, "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43)(B) (incorporating 18 U.S.C. 924(c)(2)); 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). "Any felony" naturally includes state-law felonies for conduct punishable under the Controlled Substances Act, given the INA's command that offenses be included "whether in violation of Federal or State law."

Petitioners, in fact, do not dispute that state-law felonies can be "drug trafficking crimes" for purposes of the INA's definition of "aggravated felony." Petitioners also do not dispute that possession and aiding and abetting possession of cocaine are offenses that are "punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2). Finally, petitioners agree that "felony" takes its meaning by reference to Title 18, where its established usage requires only that the offense be punished by more than one year in prison. Petitioners' convictions satisfy all of those prerequisites.

Petitioners, however, would add the requirement that a state-law drug felony also be punishable *as a felony* under federal law. That argument defies 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), which directs that an offense is an "aggravated felony," "whether in violation of Federal law *or* state law," as long as the conduct is punishable under the Controlled Substances Act (emphasis added). Further, Section 1101(a)(43)'s broad and varied coverage of state-law crimes forecloses any notion that Congress intended the aggravated felony provision to conform to a federal model for qualifying offenses or, more particularly, be limited to crimes that the federal government itself would punish as a federal felony.

Nor does petitioners' argument have any home in the text of 18 U.S.C. 924(c)(2). Congress consistently employs the ordinary term "felony" to mean that the convicting jurisdiction has authorized a prison sentence of more than one year. Petitioners cite no instance in which the status of a crime as a "felony" turns on how the offense conduct would be sentenced by a jurisdiction other than the jurisdiction of conviction.

Further, petitioners' hypothetical-federal-felony approach would produce serious inequities, because the aggravated felony designation would turn upon the happenstance of the extent to which a State's controlled substances law overlaps with the federal statutory and prosecutorial model. Under petitioners' scheme, the possession of anything more than a personal-use amount of marijuana in a State that, like the federal government, charges such an offense as possession with intent to distribute, would be an aggravated felony. But that same alien's possession of 2000 pounds of marijuana in a neighboring State, which happens to target trafficking by using a graduated scheme of increasingly severe penalties for "possession" offenses, would not be an aggravated felony, despite an authorized sentence of decades in prison. Nothing in statutory text,

congressional purpose, principles of uniformity, or the rule of lenity warrants injecting such arbitrariness into the statute.

ARGUMENT

I. PETITIONER TOLEDO-FLORES'S CASE IS MOOT

Petitioner Toledo-Flores sought this Court's review of an increase in his sentence for illegal entry under the federal Sentencing Guidelines. See 05-7664 Pet. i, 5-6, 9-17; 05-7664 Pet. Br. 4. Because Toledo-Flores has never sought any form of relief from removal, his conviction of an aggravated felony has never been contested or even legally relevant in the context of immigration proceedings. And his sole claim for relief throughout this direct appeal from his criminal conviction and sentence has been the effect of his aggravated felon designation on the length of his term of imprisonment.

Following this Court's grant of certiorari, Toledo-Flores completed the term of imprisonment that he challenges, and he has been removed from the United States. Removal rendered his remaining term of supervised release "inactive." App. A, *infra*, 7a. As a result, Toledo-Flores's case is now moot, and the Court should dismiss his petition for lack of jurisdiction.

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citations omitted). A case becomes moot when "the parties lack a legally cognizable interest in the outcome." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000) (citations omitted). Toledo-Flores now lacks any legally cognizable interest in the proper construction of "aggravated felony" under the Sentencing Guidelines. He has never challenged the merits of his conviction for illegal entry. The sole relief sought in his appeal and petition to this Court was a reduction in the length of his sentence of imprisonment.

But "[t]he []incarceration that he incurred * * * is now over, and cannot be undone." *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998). Nor, as a removed alien, can Toledo-Flores establish any type of collateral consequence flowing from his now-completed sentence (as distinguished from his conviction) that is "adequate to meet Article III's injury-in-fact requirement." *Id.* at 14.

Toledo-Flores argues (Br. 5 n.3) that the case is not moot because he is still subject to a term of supervised release. That does not save this case from mootness for three reasons.

First, whatever the impact of the aggravated-felony enhancement on Toledo-Flores's completed term of imprisonment, he has never challenged the imposition of a term of supervised release, and he does not contend that the increase in his offense level had any effect on the length of his supervised release term. In fact, Section 3583(b)(3) of Title 18 authorizes a one-year term of supervised release for Toledo-Flores's illegal entry offense regardless of whether he was previously convicted of an aggravated felony. Furthermore, this Court has held unanimously that erroneously served prison time is not to be credited against a term of supervised release. *United States* v. *Johnson*, 529 U.S. 53, 57-60 (2000).

Second, reversal of the aggravated-felony increase in Toledo-Flores's offense level would not have any practical effect on the terms or conditions of his supervised release. Because Toledo-Flores is no longer in the United States, his supervision by the United States Probation Office is "inactive." App. A, *infra*, 7a. He is not presently under the jurisdiction, custody, or control of the United States Government. He has no obligation to report to any federal probation officials, and they are not monitoring or constraining his activities in any manner. As the district court explained, "[i]n reality, we cannot supervise you in another country." 05-7664 J.A. 8. "We call it supervised release, but we're not going to—we can't

supervise you." *Id.* at 19. The term of supervised release thus has no effect on Toledo-Flores's liberty and implicates no legally cognizable interest. There are no practical conditions on Toledo-Flores's release left for a district court to modify. See 18 U.S.C. 3583(e)(2) (2000 & Supp. III 2003); *Johnson*, 529 U.S. at 60. Nor can the district court shorten the term of supervised release, because that may be done only after the "expiration of one year of supervised release," 18 U.S.C. 3583(e)(1) (2000 & Supp. III 2003), and Toledo-Flores's entire term of supervised release is only one year.[6]

Third, the only lingering effect of Toledo-Flores's remaining few months of inactive supervised release is that, were he again to enter the United States illegally before his term expires, his supervised release would be reactivated and could be revoked, App. A, *infra*, 7a, and that new offense of illegal reentry could subject him to an enhanced sentence, see 8 U.S.C. 1326(b). But mootness principles are not designed to insulate a defendant in advance against the consequences of future crimes by permitting challenges to expired sentences or inoperative terms of supervision that implicate no current or ripe stake in the outcome of the case. Toledo-Flores himself is "able—and indeed required by law—to prevent" the adverse

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[6] For that reason, Toledo-Flores's reliance on *Johnson* v. *Pettiford*, 442 F.3d 917 (5th Cir. 2006), and *United States* v. *Rodriguez-Munoz*, No. 04-11321, 2006 WL 1209382, at *1, *3 (5th Cir. May 2, 2006), is misplaced. In both of those cases, the courts retained the power to modify the terms of supervised release because the individuals remained on active supervised release within the United States and were under the ongoing jurisdiction and control of federal probation officials. Contrast *Jago* v. *Van Curen*, 454 U.S. 14, 21 n.3 (1981) (release of an individual on parole did not render a case moot because he remained subject to parole "terms that significantly restrict his freedom"). In addition, because Rodriguez-Munoz was serving a three-year term of supervised release, the court had the power to shorten the term of supervised release after one year. See 18 U.S.C. 3583(e)(1) (2000 & Supp. III 2003); *Johnson*, 442 F.3d at 918; *Rodriguez-Munoz*, 2006 WL 1209382, at *1.

consequences he portends "from occurring." *Spencer*, 523 U.S. at 15 (quoting *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982)). Accordingly, "the case-or-controversy requirement [cannot be] satisfied by general assertions or inferences that in the course of [his] activities [Toledo-Flores] will be prosecuted for violating valid criminal laws." *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974). The law "assume[s] that [Toledo-Flores] will conduct [his] activities within the law and so avoid prosecution and conviction." *Ibid.*

II. A STATE-LAW DRUG CRIME THAT IS BOTH A FELONY AND PUNISHABLE UNDER THE CONTROLLED SUBSTANCES ACT IS AN "AGGRAVATED FELONY," REGARDLESS OF WHETHER IT IS ALSO A FELONY UNDER FEDERAL LAW

Petitioners argue at length that the text of 18 U.S.C. 924(c)(2), standing alone, refers to federal felonies, and thus that any state-law conviction must also be a "hypothetical federal felony." *Gerbier* v. *Holmes*, 280 F.3d 297, 304 (3d Cir. 2002). That is wrong. It is also beside the point. Even if Section 924(c)(2) itself applied only to federal felonies, Congress eliminated that restriction for purposes of the Section's incorporation into the INA's "aggravated felony" provision. For purposes of 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), Congress directed that any offense "described in" the "aggravated felony" definition shall qualify without regard to "whether [it is] in violation of Federal or State law," or even foreign law. *Ibid.* (penultimate sentence).

Further, despite their emphasis on federal law, petitioners ultimately agree that Section 924(c)(2)'s definition, as incorporated into 8 U.S.C. 1101(a)(43)(B), includes state felony convictions—albeit a specialized subset of them—for purposes of according an offense "aggravated felony" status. But there is no basis in statutory text, established usage, legislative his-

tory, or purpose for arguing that Congress's use of the ordinary term "felony" in Section 924(c)(2) encompasses only federal felonies plus that subset of state felonies deemed by courts, in hypothetical application, to be sufficiently analogous to federal felonies. Rather, when Section 924(c)(2)'s definition is read in a straightforward and commonsense manner, it requires that the offense (i) must be a "felony" under the law of the convicting jurisdiction, and (ii) the underlying conduct must be "punishable under the Controlled Substances Act."

A. The Statutory Definition Of "Aggravated Felony" Encompasses Large Categories Of Criminal Conduct Under State Law, Without Requiring A Federal-Law Parallel

The term "aggravated felony" in the INA is a "term of art created by Congress to describe a class of offenses that subjects aliens * * * to certain disabilities." *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 902 (9th Cir. 2002); see H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. I, at 147 (1990) ("aggravated felony" is a "defined term"). The term's coverage is sweeping, encompassing more than 20 broad categories of criminal conduct. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004). The list of qualifying offenses illustrates, moreover, that, despite the appellation, "aggravated felon[ies]" are not "a subset of felonies," and, in fact, "a misdemeanor can be an 'aggravated felony.'" *Robles-Rodriguez*, 281 F.3d at 903 (citing case examples); see, *e.g.*, 8 U.S.C. 1101(a)(43)(A), (G), (J), (P), (Q), (R) and (S) (including as "aggravated felon[ies]" a variety of child-molestation, theft, gambling, forgery, counterfeiting, failure-to-appear, bribery, vehicle trafficking, and obstruction of justice offenses); see generally *INS* v. *St. Cyr*, 533 U.S. 289, 295-297 & nn. 4, 6 (2001).

Congress defined some of the categories of qualifying offenses by reference to common names for crimes, such as mur-

der, rape, sexual abuse, theft, obstruction of justice, and forgery. See, *e.g.*, 8 U.S.C. 1101(a)(43)(A), (G), (R) and (S). For others, Congress referred to how a specified federal law "defined" or "described" the offense. See, *e.g.*, 8 U.S.C. 1101(a)(43)(C)-(F) and (H)-(P) (2000 & Supp. IV 2004). Congress specifically provided, however, that regardless of definitional format, a conviction for any "offense described in" Section 1101(a)(43) is an "aggravated felony," "whether [it was] in violation of Federal or State law," or "the law of a foreign country." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Congress thus focused the definition on categories of criminal convictions, without regard to the identity of the prosecuting authority. When Congress wanted to cull out from a particular offense category what it regarded as less serious crimes, Congress generally used as its benchmark neither the label attached to a crime nor the identity of the convicting jurisdiction (federal, state, or foreign), but rather the authorized term of imprisonment. See, *e.g.*, 8 U.S.C. 1101(a)(43)(F), (G), (J) and (P)-(T).[7]

B. The Incorporating Language In 8 U.S.C. 1101(a)(43) Eliminates Any Requirement That The Conviction Be For A Felony Under Federal Law

Whatever the meaning of 18 U.S.C. 924(c)(2) in isolation, Congress eliminated any arguable hypothetical-federal-felony requirement for purposes of Section 924(c)'s incorporation into the aggravated-felony provision of the INA. The INA provides, without qualification, that the definition of "aggravated felony" applies to a conviction for a drug trafficking crime described in Section 1101(a)(43)(B)—a felony based on conduct

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[7] For two financial crimes, Congress drew the line in terms of the dollar loss caused. 8 U.S.C. 1101(a)(43)(D) and (M).

that is punishable under the Controlled Substances Act—without regard to whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Indeed, as petitioners acknowledge (Lopez Br. 5; Toledo-Flores Br. 34-35), Congress added the "Federal or State law" language to the INA in 1990 "to end further litigation" and make clear that "drug trafficking * * * is an aggravated felony whether or not the conviction occurred in state or Federal court." H.R. Rep. No. 681, Pt. I, *supra*, at 147 (approving *In re Barrett*, 20 I. & N. Dec. 171 (B.I.A. 1990), which held that an alien's state-law drug trafficking crime rendered him an aggravated felon); see Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 5048.

To require federal-law confirmation that a state offense punishable by more than one year is a felony—that is, to require that the offense also be hypothetically not just punishable under federal law, but punishable as a felony under federal law—would not only ignore the statutory text added to Section 1101(a)(43) in 1990, but would also disregard the structure of the aggravated-felony definition. Section 1101(a)(43) encompasses more than 20 types of criminal conduct and directs that a conviction for any federal, state, or foreign offense "described in" those categories constitutes an aggravated felony. In none of those other categories does the statute make the inclusion of a state-law offense contingent on the crime's hypothetical treatment under federal law, even though federal law criminalizes some of the same conduct and coverage of those crimes (*i.e.*, prostitution, child pornography, fraud, sexual abuse, burglary, obstruction of justice) and the punishments imposed may vary significantly from State to State. Nor do petitioners cite anything in the text, structure, or legislative history of 8 U.S.C. 1101(a)(43)(B) in particular to suggest that Congress was uniquely distrustful of States' con-

trolled substance laws or particularly solicitous of aliens who violate the felony prohibitions in those laws.

C. The Plain Meaning of "Any Felony Punishable Under The Controlled Substances Act" In 18 U.S.C. 924(c)(2) Includes State-Law Convictions

1. Section 1101(a)(43) of Title 8 incorporates the definition of "drug trafficking crime" in 18 U.S.C. 924(c), and the ordinary meaning of Section 924(c)(2)'s text captures not only convictions for violating federal drug laws themselves, but also state-law felony convictions for conduct that would be "punishable" under those laws.

First, the plain meaning of "punishable under" the Controlled Substances Act is that the criminal *conduct* is susceptible to sanction under that federal law, not that a conviction for a federal crime was, in fact, obtained. The ordinary dictionary meaning of "punishable" is conduct that is "liable to" or "capable of being punished by law."[8] The courts of appeals likewise have uniformly held that Section 924(c) does not require a separate conviction of the predicate crime, but rather requires only that commission of the crime be proved in establishing

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[8] *Webster's Third New International Dictionary* 1843 (1986); see *Webster's New International Dictionary* 2013 (2d ed. 1950) (same); 12 *The Oxford English Dictionary* 845 (1989) (defining "punishable" as "[l]iable to punishment; capable of being punished"). This Court has recognized that same meaning as well. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 113 (1983); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 488 (1985) (acts "punishable" under federal law "consist[] not of acts for which the defendant has been convicted, but of acts for which he could be").

the Section 924(c) violation.[9] If Congress had wanted to require a federal conviction, it would have said so.[10]

Indeed, when Congress wanted to focus specifically on federal law violations in Section 924, it did not speak of a crime "punishable under" federal law, but instead directly required "an offense under the Controlled Substances Act." 18 U.S.C. 924(e)(2)(A)(i). Only when it employed such restrictive language did Congress then find it necessary to identify separately the categories of "offense[s] under State law" that would qualify as well. 18 U.S.C. 924(e)(2)(A)(ii). Congress's contrasting selection of more inclusive language in Section 924(c)(2) thus underscores that the definition of "drug trafficking crime" is not limited to federal "offense[s] under the Controlled Substances Act," but encompasses any offense, state or federal, that could be punished—is "punishable"—under federal law, whether as a felony of a misdemeanor. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).[11]

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[9] See, *e.g.*, *United States* v. *Anderson*, 39 F.3d 331, 355 (D.C. Cir. 1994) (collecting cases), vacated in part on reh'g en banc, 59 F.3d 1323 (D.C. Cir.), cert. denied, 516 U.S. 999 (1995); *United States* v. *Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.) ("[I]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate."), cert. denied, 498 U.S. 824 (1990).

[10] See, *e.g.*, 18 U.S.C. 2251(e) (Supp. III 2003) (requiring a "conviction under" designated federal laws); 8 U.S.C. 1357(d) (requiring a "violation of any law relating to controlled substances"); 12 U.S.C. 3420(b)(1)(A) (requiring a "violation of the Controlled Substance[s] Act [21 U.S.C.A. § 801 et seq.], [or] the Controlled Substances Import and Export Act [21 U.S.C.A. § 951 et seq.]"); 18 U.S.C. 1956(c)(7)(D) (Supp. III 2003) (requiring, *inter alia*, a "felony violation of * * * section 422 of the Controlled Substances Act"); 23 U.S.C. 159(a)(3)(A)(i)(I) ("any violation of the Controlled Substances Act").

[11] The Court has repeatedly invoked that principle of statutory construction

Second, Congress referred in Section 924(c)(2) to "any felony," and "any" is an all-encompassing word that reaches all members of a class regardless of individual variations. This Court has already held, with respect to Section 924(c) specifically, that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Had Congress wanted to require a federal felony, it knew how to say so. See 18 U.S.C. 521(c)(1) and (2) (defining covered offense as "a *Federal felony* involving a controlled substance" or "a *Federal felony* crime of violence") (emphases added). But here, unlike in Section 521, "[n]o modifier is present, and nothing suggests any restriction on the scope of" felonies described. *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

2. That plain text notwithstanding, petitioners devote substantial portions of their briefs to arguing (Lopez Br. 20-24; Toledo-Flores Br. 13-26) that the phrase "felony punishable under the Controlled Substances Act" means "federal crimes" (Lopez Br. 21; Toledo-Flores Br. 19) and "is limited to a federal drug crime" (Lopez Br. 22) and to "federal offenses" (Toledo-Flores Br. 25); see *id.* at 24.

Petitioners, however, could not mean what they say. That is because, for all their emphasis on Section 924(c)'s supposed federal aspect, petitioners have always agreed in this Court that some state-law controlled substance convictions qualify as convictions for "drug trafficking crime[s]," within the meaning of Section 924(c)(2), and therefore as aggravated felonies under 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). See Lopez Br. 24-25, 28; Toledo-Flores Br. 6-7, 11-12. The questions presented and supporting arguments in their petitions for certio-

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to interpret Section 924. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (interpreting Section 924(c)); *Custis* v. *United States*, 511 U.S. 485, 492 (1994) (18 U.S.C. 924(e)).

rari focus not on *whether* state-law offenses are drug-trafficking crimes, but on *which* state offenses qualify. 05-547 Pet. i, 7-18; 05-7664 Pet. i, 10-17. And the foundational premise of the hypothetical-federal-felony approach that petitioners endorse in their merits briefs is that a state-law controlled substance offense can be a "drug trafficking crime," and thus an "aggravated felony," as long as it would hypothetically be punished as a felony under federal law. See Lopez Br. 28; Toledo-Flores Br. 11-12.

In any event, petitioners' arguments are incorrect. Lopez argues (Br. 24-25) that a state-law offense qualifies as a "drug trafficking crime" only if the "government proves that the defendant in fact violated th[e] [Controlled Substances] Act," and suggests that the proof must be "beyond a reasonable doubt" (*ibid.* (citing *United States* v. *Hopkins*, 310 F.3d 145, 152 (4th Cir. 2002), cert. denied, 537 U.S. 1238 (2003)). But in civil immigration and federal sentencing proceedings, the government need only prove the fact of a conviction, and the INA provides that the conviction can be proved simply by producing proper documentation of the conviction. 8 U.S.C. 1229a(c)(3)(B). Neither a sentencing court nor immigration officials sit as a second criminal tribunal to retry the original offense or to reprove particular elements.[12] In addition, Lopez's argument overlooks that the operative provisions of both the INA and the Sentencing Guidelines require a "convic-

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[12] In sentencing cases, proof is by a preponderance of the evidence. See *United States* v. *Watts*, 519 U.S. 148, 157 (1997); U.S.S.G. § 6A1.3, comment.; *cf. Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In immigration cases, the burden of proof as to the fact of a "conviction" shifts depending on the context in which the question arises. The government must prove an alien is removable for conviction of an aggravated felony by clear and convincing evidence, 8 U.S.C. 1229a(c)(3)(A), but if the alien is seeking relief from removal, he must prove by a preponderance of the evidence the absence of such a conviction, 8 C.F.R. 1240.8(d). See generally 8 U.S.C. 1229a(c)(3)(B) (identifying what evidence constitutes "proof of a criminal conviction").

tion" of an "aggravated felony,"and thus an actual "conviction" of an actual, not hypothetical, "drug trafficking crime."[13] Whatever happens at an immigration or sentencing hearing, the fact remains that the only drug trafficking crimes of which petitioners were "convicted" were their state-law offenses, so only those state-law offenses can be the relevant "drug trafficking crime[s]."[14]

Alternatively, petitioners contend (Lopez Br. 21-22; Toledo-Flores Br. 19-22) that the language in Section 924(c)(1)(A) that creates a federal crime for using a firearm during and in relation to a drug trafficking crime or a crime of violence shows that a "drug trafficking crime" must be a federal offense. They emphasize the language requiring that the drug trafficking crime or crime of violence be one for which the person "may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A). That language, however, does not advance petitioners' cause. The INA incorporates Section 924(c)'s "defin[ition]" of "drug trafficking crime," 8 U.S.C. 1101(a)(43)(B), and only Section 924(c)(2) *defines* "drug trafficking crime." Subsection (c)(1) creates a substantive federal

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[13] See U.S.S.G. § 2L1.2(b)(1)(C); 8 U.S.C. 1101(f)(8), 1158(b)(2)(B)(i), 1182(a)(9)(A)(i) and (ii), 1227(a)(2)(A)(iii), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(B), 1231(b)(3)(B).

[14] The INA's definition of "conviction," 8 U.S.C. 1101(a)(48)(A), which triggers the immigration and sentencing consequences of an aggravated felony, itself makes the law of the convicting jurisdiction determinative. Section 1101(a)(48)(A) provides in full:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

offense; it is not a definitional provision. Indeed, if Section 924(c)(2) had the federal-felony limitation that petitioners posit, there would have been no reason for Congress separately to require that the drug trafficking crime be subject to prosecution in federal court before it will support a 924(c)(1) federal prosecution.[15]

Finally, because petitioners agree that the definition of "drug trafficking crime" incorporated into the aggravated felony definition includes some state-law controlled substance offenses, their reliance (Toledo-Flores Br. 13-15; Lopez Br. 37) on the presumption against application of state law in federal statutes, *Jerome* v. *United States*, 318 U.S. 101, 104 (1943), is misplaced. Congress's express command in the INA that "State law" applies to the definition of "drug trafficking crime" as it is incorporated into the INA's aggravated felony provision, see 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence), conclusively dispels any such presumption. See *Jerome*, 318 U.S. at 104-106 (presumption can be overcome by the express reference to state law, legislative history, or

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[15] Moreover, while drug trafficking crimes are, by definition, already subject to prosecution in a court of the United States (because they must be punishable under federal law), the "may be prosecuted" language was necessary to confine the predicate "crime[s] of violence" for a Section 924(c)(1) prosecution to offenses that are punishable under federal law. See *Gonzales*, 520 U.S. at 5. That is because the statutory definition of "crime of violence"—unlike the neighboring definition of a "drug trafficking crime"—does not otherwise require that the qualifying conduct correspond to any federal criminal prohibition. See 18 U.S.C. 924(c)(3). Indeed, Congress enacted the "may be prosecuted" constraint in 1968, 18 years before it even added "drug trafficking crime" as a predicate offense under Section 924(c)(1), Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224, and repeated it in 1984 when it first specifically included "crime[s] of violence" in that provision, which was two years before the inclusion of "drug trafficking crime," Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1005(a), 98 Stat. 2138.

evidence that federal law would not be impaired if state law was included).[16]

D. A State-Law Felony Offense Is A Drug-Trafficking Crime Even If It is Not Hypothetically A Federal Felony

The question thus is not *whether* state-law offenses fall within the definition of "drug trafficking crime," but *which* ones. The text of Section 924(c)(2) answers that question. A state-law offense that (1) is a "felony," and (2) is "punishable under the Controlled Substances Act" or one of the other enumerated statutes, is a "drug trafficking crime." Nothing in that text, or the text that incorporates it into 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), imposes as a third condition that the offense also be a hypothetical federal felony.

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[16] Likewise, because petitioners agree that the phrase "any felony punishable under the Controlled Substances Act" in Section 924(c)(2) includes some state-law convictions, their argument that Section 924(g)'s use of the same "punishable under" phraseology excludes state-law controlled substance offenses is unavailing. Lopez Br. 22; Toledo-Flores Br. 23-24. Section 924(g) reaches conduct "punishable" under the Controlled Substances Act and conduct that violates "any State law relating to any controlled substance." 18 U.S.C. 924(g)(2)-(3). By its plain terms, the latter subsection sweeps in state offenses that have no clear parallel prohibition (whether misdemeanor or felony) in the Controlled Substances Act, such as state laws proscribing the solicitation of controlled substances, loitering in circumstances that manifest an intent to commit a controlled substance offense, the intrastate transportation of drugs (including with a minor), causing death with a controlled substance, or the felony possession of drugs in specialized areas, such as schools, recreation centers, housing projects, abuse shelters, day care centers, or churches. See, *e.g.*, Ala. Code § 13A-12-202 (2005); Alaska Stat. § 11.71.040(a)(4) (LexisNexis Supp. 2005); Ark. Code Ann. § 5-64-411 (LexisNexis 2005); Cal. Penal Code § 653f(d) (West 1999); Cal. Health & Safety Code 11379, 11532 (West Supp. 2006); Conn. Gen. Stat. § 21a-279(d) (2003); Mo. Rev. Stat. § 195.025, 195.213 (2000); Nev. Rev. Stat. § 453.333 (2005).

1. The Phrase "Punishable Under the Controlled Substances Act" Substantively Describes the Qualifying Criminal Conduct

Consistent with the "aggravated felony" provision's focus on substantive categories of criminal conduct, Congress employed a definition of "drug trafficking crime" that comprises a number of criminal offenses by referring to all crimes that are punishable under the Controlled Substances Act and the other designated laws. For purposes of state-law convictions, the definition thus requires that state law proscribe a criminal act that is also prohibited by one of the federal laws. State-law controlled substance offenses that involve conduct that is not punishable under the Controlled Substances Act, see note 16, *supra*, do not qualify as "drug trafficking crime[s]" and on that ground alone are not aggravated felonies. In this case, there is no dispute that petitioners' cocaine possession offenses are punishable under the Controlled Substances Act. See 21 U.S.C. 844(a); 18 U.S.C. 2(a) ("Whoever * * * aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States "is punishable as a principal").[17]

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[17] See also *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949) (it is "well engrained in the law" that one who aids or abets an offense "is as responsible for that act as if he committed it directly"). The Government recently filed a petition for a writ of certiorari seeking review of a Ninth Circuit decision limiting the application of the INA's aggravated felony definition as to aiding and abetting offenses. See *Gonzales* v. *Duenas-Alvarez*, No. 05-1629 (filed June 22, 2006). Lopez has never disputed that the aggravated felony definition encompasses aiding and abetting offenses or that aiding and abetting the possession of cocaine is conduct punishable under the Controlled Substances Act, and he did not seek this Court's review of those questions.

2. *"Felony" Means a Crime Punishable by the Convicting Jurisdiction by More than One Year in Prison*

a. *"Felony" Refers to the Length of the Authorized Sentence*

We agree with Lopez (Br. 25-27) that the term "felony" in Section 924(c)(2) takes its meaning from within the framework of Title 18, rather than from Title 21. To begin with, Section 924 is a provision of Title 18. Accordingly, its terms should be construed consistent with usage in that Title, unless Congress has directed otherwise, and Congress has not directed otherwise here. While Section 924(c)(2) defines the covered criminal conduct with express reference to the Controlled Substances Act in Title 21, Congress included no similar reference for the separate requirement that the crime be a "felony."

Title 18 contains no specific definition of "felony," but when a word is not defined by statute, courts "normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). Longstanding usage of the term "felony" in Title 18 and throughout the United States Code focuses not on the label put on the crime, but on the "severity of the punishment" imposed by the convicting jurisdiction. *Jerome*, 318 U.S. at 108 n.6. Throughout Title 18, unless otherwise indicated, the term "felony" has been understood to refer to a crime punishable by death or imprisonment for more than one year. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942).[18] Indeed,

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[18] See *Robles-Rodriguez*, 281 F.3d at 904 ("Congress has a longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment."); *United States* v. *Urias-Escobar*, 281 F.3d 165, 167-168 (5th Cir.) ("[F]ederal law traditionally defines a felony as a crime punishable by over one year's imprisonment."), cert. denied, 536 U.S. 913 (2002); *United States* v. *Graham*, 169 F.3d 787, 792 (3d Cir.) ("The one-year mark was used by Congress as early as 1865."), cert. denied, 528 U.S. 845

until 1984, Congress specifically defined "felony" in Title 18 as "[a]ny offense punishable by death or imprisonment for a term exceeding one year." 18 U.S.C. 1(1) (1982), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, Ch. II, § 218(a)(1), 98 Stat. 2027. In 1984, Congress replaced that provision with Section 3559, which, while lacking a specific definition, continued to classify all federal criminal offenses based on the length of the "maximum term of imprisonment authorized" and to make any offense for which the authorized penalty is more than one year of imprisonment a felony. 18 U.S.C. 3559(a); see U.S.S.G. § 2L1.2, comment. (n.2) (defining "felony" as "any federal, state, or local offense punishable by a term of imprisonment for a term exceeding one year").

That definition is repeated, either in terms or in substance, throughout the United States Code, including within 18 U.S.C. 924 and the Controlled Substances Act. Importantly, a number of those provisions refer to both state and federal convictions, which shows that the term "felony" does not, standing alone, necessarily connote a federal felony. See, *e.g.*, 18 U.S.C. 924(e)(2)(B); 21 U.S.C. 802(44).[19] The vast majority of States apply that same definition as well.[20] Cf. *Taylor* v. *United*

(1999); *United States* v. *Burston*, 159 F.3d 1328, 1335 n.13 (11th Cir. 1998) (the "traditional definition of a felony" is an offense "punishable by death or imprisonment in excess of one year"); *United States* v. *Page*, 84 F.3d 38, 41 (1st Cir. 1996) ("[F]elony had long been defined as 'any offense punishable by * * * imprisonment for a term exceeding one year.'") (citation omitted).

[19] See also 7 U.S.C. 2024(b)(1) and (c); 18 U.S.C. 751(a), 922(g)(1), 3156(a)(3), 3592(c)(2) and (10); 22 U.S.C. 2714(e)(3); 28 U.S.C. 540A(c)(1); 29 U.S.C. 186(d)(1) and (2); 49 U.S.C. 31301(9); 49 U.S.C. 44936(b)(1)(B)(xiv)(IX) (Supp. III 2003); Fed. R. Evid. 609(a) advisory committee's note.

[20] See Ala. Code § 13A-1-2(8) (2005); Alaska Stat. § 11.81.900(a)(24) (LexisNexis Supp. 2005); Ark. Code Ann. § 5-4-401 (LexisNexis 2006); Cal. Penal Code §§ 17, 19.2 (West 1999); Conn. Gen. Stat. § 53a-25 (2003); Del. Code Ann. title 11, §§ 233, 4205-4206 (2001 & Supp. 2004); Fla. Stat. § 775.08 (2001); Ga. Code Ann. § 16-1-3(5) (2003); Haw. Rev. Stat. § 701-107(2) (1993); Ind. Code

States, 495 U.S. 575, 598 (1990) (construing the term "burglary" in 18 U.S.C. 924(e)(2)(B)(ii) in accord with "the generic sense in which the term is now used in the criminal codes of most States").

Accordingly, in the absence of any contrary indication, the Court should give the term "felony" its "well-established meaning" in federal law. *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86 (2000). Furthermore, focusing the definition of "felony" on the maximum punishment authorized for an offense under the law of the convicting jurisdiction provides a level of uniformity to the definition of drug trafficking crime by making the applicability of a state-law conviction turn not upon varying nomenclature, see *Small* v. *United States*, 544 U.S. 385, 393 (2005), but upon an objective measure of the seriousness with which the convicting jurisdiction regards the offense.[21]

Ann. § 35-50-2-1 (LexisNexis 2004); Kan. Stat. Ann. §§ 21-3105, 21-4501 to 21-4502 (1995 & Supp. 2004); Mich. Comp. Laws Ann. § 761.1(g) (West 2000); Minn. Stat. Ann. § 609.02(2) (West Supp. 2006); Mo. Rev. Stat. § 556.016(2) (2000); Neb. Rev. Stat. §§ 28-105, 28-106 (Supp. 2004); N.H. Rev. Stat. Ann. § 625:9(III) (Supp. 2005); N.Y. Penal Law § 10.00(5) (2004); N.D. Cent. Code § 12.1-32-01 (1997); Ohio Rev. Code Ann. § 2901.02 (LexisNexis 2006); Okla. Stat. title 21, §§ 5-6, 10 (2001); Or. Rev. Stat. § 161.525 (2005); R.I. Gen. Laws § 11-1-2 (2002); S.D. Codified Laws § 22-1-4 (West Supp. 2006); *id.* § 22-6-2 (2004); Tex. Penal Code Ann. § 1.07(23) (West Supp. 2006); *id.* §§ 12.21-12.23 (2003); Utah Code Ann. §§ 76-3-102, 76-3-204 (2003); Va. Code Ann. §§ 18-2-8, 18-2-10 (LexisNexis 2004); Wash. Rev. Code Ann. § 9A.04.040(2) (West 2000); Wyo. Stat. Ann. § 6-10-101 (LexisNexis 2005). Four States define "felony" in terms of whether the offense is punishable by incarceration in a state prison or "at hard labor," which in practice appears to correspond with the traditional definition of a felony. See Idaho Code Ann. §§ 18-111 to 18-113 (2004 & Supp. 2005); La. Rev. Stat. Ann. § 14:2(4) (West Supp. 2006); Miss. Code. Ann. § 1-3-11 (West 1999); W. Va. Code Ann. § 61-11-1 (LexisNexis 2005).

[21] Section 802(13) of Title 21 defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." Some courts have applied that definition of "felony" in holding (at the government's behest)

b. "Felony" Status Depends on the Sentence Authorized by the Convicting Jurisdiction

Petitioners do not dispute (i) that the conduct of which they were convicted was "punishable under the Controlled Substances Act," or (ii) that whether an offense is a "felony" for these purposes turns upon the length of the authorized term of imprisonment. The problem for petitioners is that their state-law convictions—which were subject to terms of imprisonment exceeding one year and were for conduct punishable under the Controlled Substances Act—fall squarely within the plain meaning of Section 924(c)(2), as incorporated into 8 U.S.C. 1101(a)(43)(B). That reading, moreover, gives full effect to every word of the relevant statutory provisions, and leaves nothing else to interpret.

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that a State's designation of an offense as a "felony" is sufficient for purposes of Section 924(c). The Court need not resolve that issue in this case, however, because petitioners' offenses were both designated felonies under state law *and* punishable by more than one year in prison. See S.D. Codified Laws § 22-42-5 (Michie 1988); *id.* § 22-6-1(7) (1988 & Supp. 1997); Tex. Health & Safety Code Ann. § 481.102 (West Supp. 2006); *id.* § 481.115 (2003); Tex. Penal Code § 12.35 (West 2003). In any event, as petitioners note (Lopez Br. 26; Toledo-Flores Br. 26), Congress did not incorporate Title 21's definition of felony into 18 U.S.C. 924(c) (2000 & Supp. III 2003). Even if it had, that would not resolve the question of whether, for purposes of 21 U.S.C. 802(13), state or federal law is the "applicable" law in 18 U.S.C. 924(c)(2). Given that two States eschew the felony/misdemeanor distinction entirely, see N.J. Stat. Ann. § 2C:1-4 (2005); Me. Rev. Stat. Ann. title 17-A, § 1252 (2006), mere labels would not always suffice to categorize an offense as a drug trafficking crime. Moreover, reliance on the felony/misdemeanor label would be particularly unwieldy under the aggravated felony provision because that provision attaches consequences not only to state drug trafficking crimes, but also to foreign crimes. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). Cases relying upon foreign convictions as aggravated felonies have relied upon the length of the sentence to determine the crime's "felony" status. See, *e.g.*, *Ortiz* v. *INS*, 179 F.3d 1148, 1154-1156 (9th Cir. 1999); *United States* v. *Adkins*, 102 F.3d 111 (4th Cir. 1996), cert. denied, 522 U.S. 824 (1997).

In an effort to escape that conclusion, petitioners proffer a whole new definition of "felony" that has no basis in the law or precedent and is unworkable in practice. Petitioners argue (Lopez Br. 28; Toledo-Flores Br. 6-7, 12) that the "felony" requirement in Section 924(c) turns not on whether the offense is a "felony" in the convicting jurisdiction, but rather on whether it would be a felony if prosecuted in a different jurisdiction (*i.e.*, under federal law).[22] In other words, in petitioners' view, the felony status of the crime under state law is not enough. Federal law must second the State's judgment. There are four significant problems with that approach.

First, that is not how Congress wrote Section 924(c)(2). There is only one "felony" in the definition, and its only descriptor is the word "any," which is a term of expansion, not qualification. 18 U.S.C. 924(c)(2) ("any felony"). "Had Congress intended the narrow construction petitioner[s] urge[], it could have so indicated," *Smith*, 508 U.S. at 229, by simply defining "drug trafficking crime" as "any felony punishable *as such* under the Controlled Substances Act," or "any offense that is punishable *as a felony* under the Controlled Substances Act." See, *e.g.*, *United States* v. *Wilson*, 316 F.3d 506, 513 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *Gerbier*, 280 F.3d at 307; *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996). Congress, after all, knows how to write such words of limitation when it wants them. See 7 U.S.C. 12a(3)(H) (SEC may decline to register an individual who has been convicted of conduct "which would constitute a felony under Federal law if the offense had been committed under Federal jurisdiction"); 18 U.S.C. 521(c)(1) and (2) (requiring "a Federal felony involving a controlled substance" or "a Federal felony crime of

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[22] It is unclear whether petitioners, like amicus American Bar Association (Br. 8-13), would also require that the felony be punishable under state law by more than one year in prison, be classified as a "felony" by the State, or both. See *United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-436 (4th Cir. 2005).

violence"). But Congress did not use such language here, and the Court should "decline to introduce that additional requirement on [its] own." *Smith*, 508 U.S. at 229 (declining to read into 18 U.S.C. 924(c)(1)'s prohibition against the "use" of a firearm the additional requirement that the firearm be used "as a weapon").

Second, petitioners' definition would require an unprecedented use of the term "felony," by requiring that an offense's qualifying status be determined by reference not to the jurisdiction of conviction, but to how another jurisdiction treats that offense. While federal law may establish the criterion for according a crime felony status—generally based on the term of imprisonment—satisfaction of that criterion is, in the absence of a contrary indication, assessed from the perspective of the convicting jurisdiction, not some other jurisdiction.[23] For example, 18 U.S.C. 16, which is also incorporated into the aggravated felony definition, 8 U.S.C. 1101(a)(43)(F), defines a "crime of violence" as, *inter alia*, a "felony" that entails a substantial risk of the use of force against a person or property. 18 U.S.C. 16(b). Courts have not limited state-law "crime[s] of violence" under that provision to those that would hypothetically be felonies under federal law.[24] Indeed, peti-

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[23] See, *e.g.*, 5 U.S.C. 7313(a); 5 U.S.C. 7371(a)(1); 5 U.S.C. 8148(b)(1); 7 U.S.C. 499d(d); 8 U.S.C. 1366(1) and (2); 21 U.S.C. 802(44); 21 U.S.C. 862a(a); 28 U.S.C. 540A(a); 29 U.S.C. 1111(a); 38 U.S.C. 5313(a)(1) and (b)(3); 38 U.S.C. 5313B(b)(1)(A) (Supp. III 2003); 42 U.S.C. 402(d)(7)(A); 42 U.S.C. 423(d)(6)(A) and (B); 42 U.S.C. 608(a)(9)(A)(i); 42 U.S.C. 1004(a)(2); 42 U.S.C. 1382(e)(1)(J)(4)(A); 42 U.S.C. 1437f(d)(1)(B)(v)(I); 42 U.S.C. 1437z(2)(A)(i).

[24] See, *e.g.*, *Leocal*, 543 U.S. at 7; *Francis* v. *Reno*, 269 F.3d 162, 169 (3d Cir. 2001) (felony status of crime in convicting jurisdiction, not its hypothetical felony status under federal law, is determinative); see also *United States* v. *Hernandez-Rodriguez*, 388 F.3d 779, 781 (10th Cir. 2004); *United States* v. *Campos-Fuerte*, 357 F.3d 956, 959 (9th Cir.), as amended, 366 F.3d 691 (9th Cir.), cert. denied, 543 U.S. 859 (2004); *Jobson* v. *Ashcroft*, 326 F.3d 367, 372 (2d Cir. 2003); cf. *United States* v. *Jackson*, 301 F.3d 59, 61 (2d Cir. 2002) (escape

tioners cite no decision from this Court, or from any court outside of the present context, that has ever held that whether an offense is a "felony" turns upon an analogous or hypothetical crime's status in a non-convicting jurisdiction.

Third, the question here is not the meaning of Section 924(c)(2) standing alone or in the abstract, but rather as incorporated *mutatis mutandis*—that is, with all necessary changes having been made—into 8 U.S.C. 1101(a)(43). See *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 16-17 (2000); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 680 (1986). Because Section 1101(a)(43) expressly covers state offenses, it follows from the very nature of the incorporation that the inclusion of a state drug offense as an aggravated felony should turn on whether the state of conviction treats the offense as a felony, as gauged by the term of imprisonment authorized.[25]

Third, as the Board of Immigration Appeals recognized after attempting to administer the test, the hypothetical-

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is a "felony" crime of violence for purposes of Section 924(e)), cert. denied, 539 U.S. 952 (2003); *United States* v. *Woods*, 233 F.3d 482, 485 (7th Cir. 2000) (burglary of a commercial building is a violent "felony" under Section 924(e)).

[25] To the extent that the Title 21 definition of "felony" is thought relevant here, it also supports looking to the law of the convicting jurisdiction to determine whether a crime is classified as a "felony" under 18 U.S.C. 924(c)(2), as incorporated into 8 U.S.C. 1101(a)(43)(B). Under 21 U.S.C. 802(13), "[t]he term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." Accord 21 U.S.C. 802(44) ("'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States *or* of a State *or* foreign country") (emphases added). Each of petitioners' offenses is a "felony" under the Controlled Substances Act's definitions, because each of their offenses was classified by applicable state law, both in name and by term of imprisonment, as a felony. See *Wilson*, 316 F.3d at 513 ("[W]hile the [Controlled Substances Act] would not *punish* Wilson's conduct as a felony, it does *define* it as a felony given the punishment it receives under Virginia law.").

federal-felony approach is unworkable. In *In re L-G-*, 21 I. & N. Dec. 89 (1995), withdrawn in part, *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002), the Board initially held that an alien's state-law felony possession of more than 400 grams of cocaine, which resulted in a 20-year sentence at hard labor, was not a drug trafficking crime because it was not "analogous to a *felony* under the federal statutes." *Id.* at 90, 92. After years of attempting to administer that approach, the Board abandoned it. *Yanez-Garcia*, 23 I. & N. Dec. at 390-391. The Board held that, in the absence of contrary circuit precedent, it would follow the approach of the majority of the circuits and hold that a state-law felony offense, such as for felony possession, is a drug trafficking crime without regard to how the offense might have been punished under federal law. *Id.* at 393-398.

The Board explained that the majority approach "bears considerable logical force and flows coherently and intuitively from the relevant statutory language." *Yanez-Garcia*, 23 I. & N. Dec. at 397. The Board stressed, moreover, that the hypothetical-federal-felony approach that petitioners advocate had proven to be inadministrable in practice. The Board repeatedly noted the "analytical difficulties inherent in the hypothetical felony approach" and "often-convoluted hypothetical analysis that can be difficult to apply in practice," *id.* at 393, 397-398.

> [W]hen determining whether a state drug conviction is analogous to a federal felony conviction, we are confronted with the fact that any hypothetical federal prosecution would have been governed by procedural and sentencing requirements entirely different from those that were, in fact, employed by the convicting state.

Id. at 392; see *id.* at 392, 396.[26]

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[26] While the Board is not entitled to deference in its construction of Section

Yanez-Garcia highlighted, as an example, the "analytical difficulties" that attend the treatment of recidivist drug possessions. Second or successive drug possession offenses are felonies under federal law, 21 U.S.C. 844(a), but may or may not be, in differing degrees and differing circumstances, under state law. Courts and the Board have wrestled with whether to condition the hypothetical federal felony determination on the fortuity of whether the state prosecutor complied with the type of notice and procedural constraints that are required by federal law. For example, the alien in *Yanez-Garcia* argued that his recidivist state-law felony possession offenses were not federal felonies, because federal law required that the first felony conviction be "final," and because he did not receive an "enhancement information" from a federal prosecutor, see 21 U.S.C. 851(a)(1). *Yanez-Garcia*, 23 I. & N. Dec. at 391-392.[27]

Furthermore, as noted earlier, some States have structured their controlled substance laws in ways that do not translate well into the federal system. Many State laws, including the South Dakota law under which Lopez was convicted, do not distinguish between cocaine and cocaine base,[28]

924(c)(2), a criminal statute that it has not been charged with administering, the Board's construction of 8 U.S.C. 1101(a)(43), and particularly its judgment, borne of hands-on experience, about the inadministrability of imposing the hypothetical-federal-felony approach on the INA's aggravated felony provision, merit deference. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 322 (1988) (Scalia, J., concurring in part and dissenting in part) ("[O]ne of the most important reasons we defer to an agency's construction of a statute [is] its expert knowledge of the interpretations' practical consequences."); see generally *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

[27] See also *Vacchio* v. *Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005) (prior conviction established a hypothetical federal felony); *Steele* v. *Blackman*, 236 F.3d 130, 137-138 (3d Cir. 2001) (strictly limiting use of prior convictions); cf. *Price* v. *United States*, 537 U.S. 1152 (2003).

[28] See, *e.g.*, S.D. Codified Laws §§ 34-20B-1(13), 34-20B-16(2) (West 2004); Ark. Code § 5-64-101(18)(B) (LexisNexis 2005); Idaho Code §§ 37-2701(t)(4), 37-

while federal law makes simple possession of specified amounts of cocaine base a felony, 21 U.S.C. 844(a). In addition, a prosecution under federal law based on the possession of more than a personal-use amount of drugs would ordinarily be for possession with intent to distribute, which is a felony, see 21 U.S.C. 841(a). But a number of States take a different approach, providing a graduated scheme of "possession" offenses that assigns felony treatment, with a potentially severe sentence, when the amount possessed is commensurate with a trafficking crime, while not specifically requiring proof of an intent to distribute. See *State* v. *Williams*, 471 So.2d 255, 258-259 (La. Ct. App. 1985) (defendant convicted of possessing 10,000 pounds of marijuana), writ denied, 475 So.2d 1102 (1985); *L-G-*, 21 I. & N. Dec. at 90 (alien convicted of "possession" of in excess of 400 grams of cocaine and sentenced to "20 years at hard labor").[29] There is no sound reason to withhold

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2707(a) and (b)(4) (2002); Kan. Stat. Ann. §§ 65-4107(a) and (b), 65-4127e(a) and (b) (1992); Miss. Code §§ 41-29-105(s)(4), 41-29-115(A)(a)(4) (Supp. 2005).

[29] See also *State* v. *Basurto*, 501 P.2d 970, 972 (Az. Ct. App. 1972) (noting foreign conviction for possession of three tons of marijuana); U.S. Br. at 3, 5, 10, *Salazar-Regino* v. *Moore*, No. 05-830 (filed Apr. 5, 2006) (one petitioner convicted of possessing between 50 and 2000 pounds of marijuana, which was punishable by 2 to 20 years in prison; second petitioner convicted of possessing between 5 and 50 pounds of marijuana, which was punishable by 2 to 10 years in prison); U.S. Br. at 4, 7, *Galindo-Pena* v. *Gonzales*, No. 05-1276 (filed July 7, 2006) (petitioner convicted of possessing 50 to 2000 pounds of marijuana and sentenced to eight years in prison); *In re Castillo-Zapata (alias Maria de Jesus Ramo)*, No. A37 837 447, at 2 (Immig. Ct. June 4, 2003); U.S. Br. in Opp. at 6, *Hernandez-Macias*, No. 05-11277 (filed Aug. 2, 2006) (petitioner convicted of possessing 50 to 2000 pounds of marijuana); *Gerbier*, 280 F.3d at 300-301, 313-314 (under Delaware law, possession of between 5 and 50 grams of cocaine is punished as "trafficking in cocaine"); Del. Code Ann. title 16, § 4753A(a) and (e) (2003 & Supp. 2004) (defining sale and distribution solely in terms of possession in excess of a designated weight); Ohio Rev. Code Ann. § 2925.11(C) (LexisNexis 2006) (criminalizing as "possession" the possession of "bulk amounts" of drugs "that are normally possessed by a drug seller, pusher or

the aggravated-felony designation from such crimes on the ground that the "possession" label attached by state law would, if transferred mechanically into the federal system, be only a misdemeanor offense of "simple possession." Petitioners, for all their concern with uniformity in the treatment of aliens, offer no explanation for why Congress would have wanted the aggravated-felony designation to turn upon either an unrealistic conception of how federal law operates in practice or the happenstance of how States formulate their controlled substance offenses, rather than the punishment they attach.[30]

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dealer," *State* v. *Goodnight*, 370 N.E.2d 486 (Ohio Ct. App. 1977)); Alaska Stat. § 11.71.040(a)(3)(G) and (d) (LexisNexis 2004) (felony possession of 25 or more marijuana plants); La. Rev. Stat. Ann. § 40:966(F) (West Supp. 2006) (felony possession of more than 60 pounds of marijuana); Me. Rev. Stat. Ann. title 17-A, §§ 1107-A(1)(A)-(B), 1252 (2006) (possession of more than 14 grams of cocaine punishable as a felony); Miss. Code Ann. § 41-29-139(c)(2)(D)-(G) (Supp. 2005) (felony possession of more than 250 grams of marijuana); Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2003) (felony possession of between 50 and 2000 pounds of marijuana); Tex. Health & Safety Code Ann. § 481.121(b) (West 2003) (graduated offenses for possession include life imprisonment for more than 2000 pounds of marijuana); Wash. Rev. Code Ann. §§ 69.50.4013, 69.50.4014 (Supp. 2006) (felony possession of more than 40 grams of marijuana).

[30] Lopez argues (Br. 28-29) that his unusual construction of "felony" must be adopted to prevent tension between the aggravated-felony removal provision, 8 U.S.C. 1227(a)(2)(A)(iii), and the INA provision excluding the first-time possession of 30 grams or less of marijuana for personal use from the "controlled substances" convictions that provide a separate basis for removal. See 8 U.S.C. 1227(a)(2)(B)(i). Whatever the traction of such an argument in theory, it has little basis in reality (a fact of which Congress presumably was aware). Thirty grams is approximately one ounce of marijuana, and only one State punishes the possession of less than one ounce of marijuana for personal use as a felony. See Fla. Stat. § 893.13(6)(a) and (b) (2001) (punishing possession of over 20 grams of marijuana as a felony). Lopez cites no case that has ever both fallen within that 10 gram gap and led to removal on aggravated felony grounds. While a handful of States draw the felony line at one ounce (more precisely, 28.3 grams), see Nev. Rev. Stat. §§ 453.336(4), 453.3395(1)

E. The Incorporation Of "Drug Trafficking Crime" Into 8 U.S.C. 1101(a)(43)(B) Ensures That Certain Possession Offenses Can Be "Aggravated Felonies"

Although Congress could have limited the drug offenses included as aggravated felonies to "illicit trafficking in a controlled substance," 8 U.S.C. 1101(a)(43)(B), Congress deliberately went further. Congress added that the qualifying offenses "includ[e] a drug trafficking crime (as defined in section 924(c) of Title 18)." In so doing, Congress sought to ensure that the category of controlled substance offenses that can trigger an aggravated felony designation would include certain types of offenses less commonly associated with "trafficking," such as the enumerated statutes' prohibitions on drug possession, see 21 U.S.C. 844(a), 955, and other similar offenses, see also 21 U.S.C. 843(a)(5) and (6) (possession of certain types of equipment). "In definiti[onal] provisions of statutes * * *, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). That is how Congress used "include" in other parts of the aggravated felony definition. See 8 U.S.C. 1101(a)(43)(G) ("theft offense" defined as "including receipt of stolen property"); 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (final sen-

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(1995); N.D. Cent. Code § 19.03-1-23(6) (Supp. 2005); Or. Rev. Stat. § 475.864(2) and (3) (2005), the government is aware of no removal case falling within the exceedingly marginal gap between 28.3 and 30 grams either. In any event, the remote prospect of such a case ever arising provides no basis for concluding that the term "felony" is used here in the novel manner that petitioners propose. It suggests at most that, in some hypothesized case in the future, a court might have to resolve whether the later enacted and specific personal-use exception, Immigration Act of 1990, Pub. L. No. 101-649, § 602(a), 104 Stat. 5077, overrides the general language of the aggravated felony provision. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) ("[T]he specific governs over the general.").

tence) (defining "provision of law" as "including any effective date"). That is also how the term is employed throughout the INA's other definitional provisions. See 8 U.S.C. 1101(a)(14), (17), (28), and (36).

Indeed, having just defined "aggravated felony" in the preceding clause in 8 U.S.C. 1101(a)(43)(B) to mean, *inter alia*, "illicit trafficking in a controlled substance," the only evident function of the "including" clause is to ensure that the type of offense conduct covered would include offenses that are less commonly characterized as illicit trafficking, like possession. To hold otherwise, as amicus NYSDA argues (Br. 6-28), and read the entire "drug trafficking crime" clause as encompassing nothing more than offenses that are already a "subset" (*id.* at 6) of "illicit trafficking" would leave that entire clause "with no job to do." *Doe* v. *Chao*, 540 U.S. 614, 623 (2004). Congress, however, is not in the habit of drafting entire definitional clauses that "accomplish[] nothing," *ibid.*, and it is a "cardinal principle of statutory construction" that the Court must "give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section," *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (internal quotation marks omitted).

Nor is there anything incongruous about Congress's inclusion of possession offenses in a provision addressed to drug trafficking. First, in the same statute passed in 1988, Congress enacted both the broad definition of "drug trafficking crime" in Title 18 and the "aggravated felony" provision in the INA, and it deliberately linked the two by providing that "any drug trafficking crime as defined in section 924(c)(2) of title 18" constitutes an aggravated felony. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6212, 7342, 102 Stat. 4360, 4469. The title of that law, moreover, was not the Anti-Drug Trafficking Act, but the "Anti-Drug Abuse Act," an express purpose of which was "[t]o prevent the * * * use of illegal drugs." Preamble, 102 Stat. 4181.

Second, Congress has long recognized that illegal drug possession offenses "have a substantial and detrimental effect on the health and general welfare of the American people," and that individual acts of possession "have a substantial and direct effect" on illicit drug trafficking and "contribute to swelling the interstate traffic in such substances." 21 U.S.C. 801(2), (3) and (4); see *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2209 (2005) (failure to regulate individual cultivation or use of controlled substances "would leave a gaping hole in the [Controlled Substances Act]"). Indeed, the cocaine that each petitioner possessed (or aided another in possessing) was itself the product of a chain of drug trafficking and sales.

"Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *Harmelin* v. *Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part) (citation omitted). Indeed, because "drug abuse is one of the most serious problems confronting our society today," *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 674 (1989), there is no logical reason that Congress—having made offenses like failure to appear, obstruction of justice, and mutilating a passport "aggravated felonies," 8 U.S.C. 1101(a)(43) (P), (Q), (S) and (T)—would want to be particularly solicitous of aliens who fuel "the drug epidemic in this country," *Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring in part). See *Barrett*, 20 I. & N. Dec. at 175 (in 19 U.S.C. 924(c)(2), "Congress has sent out a clear message that narcotics offenses are to be dealt with harshly.") (citation omitted).

Third, petitioners' assumption that there is some clear divide between drug possession offenses and drug trafficking overlooks that, as explained above, States have adopted a variety of strategies within their criminal codes to combat drug abuse. Federal law and prosecutorial practice generally police

trafficking offenses by charging possession of more than a personal-use amount of a drug as possession with intent to distribute, which is a federal felony, see 21 U.S.C. 841(a) and (b)(1) (2000 & Supp. III 2003).[31]

A number of States, however, take a different tack and establish a graduated system of penalties for possession, under which possession of trafficking-level amounts of a controlled substance are subject to the same type of severe penalties as federal trafficking offenses, even though the offense of conviction remains denominated "possession." Indeed, the individual whom amicus Asian American Justice Center describes (Br. 15) as a "positive contributor[] to American society" and unjustly labeled as a "traffick[er]" was convicted in Texas of possessing between 50 and 200 pounds of marijuana. *In re Castillo-Zapata (alias Maria de Jesus Ramo)*, No. A37 837 447, at 2 (Immig. Ct. June 4, 2003); see note 29, *supra*; cf. *Raich*, 125 S. Ct. at 2214 nn. 41 & 42.

A state-law conviction for "possession" of a controlled substance thus does not have the singular, non-trafficking connotation that petitioners' arguments assume (Lopez Br. 18-20; Toledo-Flores Br. 15-18). Accordingly, Congress sensibly included within the category of drug-related "aggravated felonies" those possession offenses that are sufficiently serious to be punished by the State of conviction as a felony.

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[31] See, *e.g.*, *United States* v. *Haskins*, 166 Fed. Appx. 76 (4th Cir. 2006) (per curiam) (charging possession with intent to distribute 310.6 grams—approximately 11 ounces—of marijuana); *United States* v. *Rangel*, 149 Fed. Appx. 254, 255 (5th Cir. 2005) (per curiam) (charging possession with intent to distribute 771 grams—approximately 1.75 pounds—of marijuana); see generally 28 C.F.R. 76.2 (defining "personal use amounts" of various controlled substances).

F. The Legislative History Does Not Support Petitioners

Petitioners argue (Lopez Br. 29-33; Toledo-Flores Br. 29-37) that the legislative history supports their proposed hypothetical-federal-felony approach. As an initial matter, because the meaning of "felony" is plain, the meaning of "punishable under the Controlled Substances Act" is plain, and the inclusion of state-law offenses is plain, this Court need "not resort to legislative history" in an effort "to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994); see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2459 (2006).

Beyond that, what is notably missing from petitioners' legislative-history argument is *any* specific discussion of the issue presented here. Whatever the legitimacy of relying on legislative history that actually discusses the statutory construction question before the Court, inferences distilled from isolated statements addressed to other legislative concerns provide no basis for narrowing or disregarding straightforward statutory text.

In any event, even the materials that petitioners cite fail to support their position. First, petitioners argue (Lopez Br. 30-31; Toledo-Flores Br. 30-32) that Congress's enactment in 1988 of the current definition of "drug trafficking crime," see Anti-Drug Abuse Act, § 6212, 102 Stat. 4360, was a "clarification" of prior text that encompassed "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance," 18 U.S.C. 924(c)(2) (Supp. V 1987). But that contention begs the question of how much clarifying Congress did. Statutory "clarifications" sometimes effect "significant change" in the law. *United States* v. *California*, 381 U.S. 139, 155 (1965); see *id.* at 197 (Black, J., dissenting); see also *Commissioner* v. *Bilder*, 369 U.S. 499, 503-504 (1962).

Lopez argues (Br. 31) that the amended text made clear that possession with intent to distribute was covered. It certainly did. But the text does not stop there. As incorporated into 8 U.S.C. 1101(a)(43), the new definition also reaches—by petitioners' own admission (Lopez Br. 28; Toledo-Flores Br. 11-12)—some state-law offenses. In addition, the new language captures, under petitioners' own reading, some possession felonies, because the Controlled Substances Act and the Controlled Substances Import and Export Act punish certain possession offenses as felonies. See 21 U.S.C. 844(a), 955. As to which state-law offenses and which possession offenses are covered, the legislative record in 1988 says no more. The closest it comes is Senator Biden's statement that "[t]he amendment makes clear that section[] 924(c) * * * cover[s] *all* drug felonies." 134 Cong. Rec. 32,695 (1988). But that statement hurts, rather than helps, petitioners.

Second, petitioners attempt (Lopez Br. 31-33; Toledo-Flores Br. 32-37) to derive support for their position from the history of the 1990 amendment to the INA that directed that "aggravated felony" encompasses any offense "described in" Section 1101(a)(43), "whether in violation of Federal or State law" or foreign law. But there is nothing there to help petitioners. Both petitioners agree (Lopez Br. 32; Toledo-Flores Br. 34-35) that Congress intended to codify the Board's decision in *Barrett*, which had held that state-law offenses are "drug trafficking crime[s]" within the meaning of Section 924(c)(2). See 20 I. & N. Dec. at 175 ("[I]t is unreasonable to assume that Congress * * * sought to differentiate between aliens convicted of similar drug-related offenses on the basis of whether the conviction was accomplished under state or federal law."). The Board also held that the state crime must be "sufficiently analogous" to a federal felony. *Ibid.* But the Board did not then "speak to the question whether, for purposes of determining if a state drug conviction constituted a

'drug trafficking crime,' it mattered whether the state conviction was a misdemeanor or a felony." *Gerbier*, 280 F.3d at 304. And, as Toledo-Flores acknowledges (Br. 35), nothing in the legislative history speaks to or even refers to the aspect of the Board's holding that required a "sufficiently analogous" federal felony. Indeed, nothing suggests that Congress had in mind any limitation at all on the types of state-law offenses encompassed within the aggravated felony provision, other than the textual directive that they be "described in" Section 1101(a)(43).[32]

Third, various indicia in the legislative history confirm the plain language reading of both the INA and Section 924(c)(2). "Trafficking" in its narrow sense was not Congress's only concern; Congress took aim at use and possession. The 1988 law included reducing the "use" of illegal drugs among its avowed purposes. See Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (preamble). The need to eradicate the demand for illegal drugs, and not just the supply, was frequently discussed in the legislative history, along with the enormous strain that incarcerating aliens for controlled substance offenses was putting on the States' criminal justice systems.[33] Thus, to the

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[32] Lopez argues (Br. 33) that, if state "drug trafficking crimes" fall within Section 924(c)(2), then there was no need for Congress to also cover "illicit trafficking" offenses. That is incorrect. The inclusion of "illicit trafficking" sweeps in all trafficking offenses, without the requirement that they be either felonies or conduct punishable under the Controlled Substances Act or the other designated federal laws. The added language thus captures, for example, trafficking offenses under other federal criminal laws, *e.g.*, 18 U.S.C. 2118 (robberies and burglaries involving controlled substances); 21 U.S.C. 1901 *et seq.* (Foreign Narcotics Kingpin Designation Act), and state misdemeanor trafficking offenses and felonies not covered by the Controlled Substances Act, see, *e.g.*, Haw. Rev. Stat. § 712-1248 (1993) (misdemeanor distribution of marijuana); note 16, *supra*.

[33] See 134 Cong. Rec. at 32,633-32,634 (Sen. Dole) ("[W]e will focus attention back on the crime—in most cases the felony—of possession of illicit drugs.");

extent the legislative history is relevant, it counsels against petitioners' proposed categorical exception for state possession offenses—especially the possession of drugs in quantities that are strongly indicative of trafficking and are accordingly regarded by the prosecuting jurisdiction as deserving of treatment as felonies.

G. Including State Felonies Is Consistent With Both Principles Of Uniformity And The Rule Of Lenity

1. As explained, the relevant statutory provisions, by their terms, include state-law drug felonies as aggravated felonies, without requiring a hypothetical-federal-felony counterpart. The courts of appeals that have addressed the question in the criminal sentencing context have uniformly agreed that the plain language covers state felony drug offenses,[34] with the

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id. at 32,636 (Sen. Chiles) ("[W]e cannot win the drug war if we do not reduce the demand for drugs."); *id.* at 32,652 (Sen. Helms) (failure to punish "[p]ossession alone" had been "a giant loophole" in the law); H.R. Rep. No. 681, *supra*, Pt. I, at 146-147 (noting, immediately before discussing *Barrett*, the large percentage of drug-related offenses committed by illegal aliens, both misdemeanors and felonies); *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 95 (1989) (Judge David Carter) ("The 'drug war' has focused on the federal level and failed to recognize that most offenders are under state jurisdiction."); *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Federal Spending, Budget & Accounting of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 1, 4, 5, 19, 21-22, 33, 51-52, 58, 97-98, 133 (1987); *id.* at 10 ("[T]he number of aliens involved in criminal activities, particularly drugs is increasing every day" and "creating a burden on an already overcrowded jail.").

[34] See *Restrepo-Aguilar*, 74 F.3d at 364-366 ("The statutory definition plainly does not require that an offense, in order to be a drug trafficking crime, be subject to a particular magnitude of punishment if prosecuted under the [Controlled Substances Act]."); *United States* v. *Rodriguez*, 26 F.3d 4, 7 (1st Cir. 1994) (relying on natural meaning of text because "[w]e are not at liberty * * * to rewrite the statutory scheme"); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-147 (2d Cir.) (relying on statutory text), cert. denied, 528 U.S. 880

sole exception of a decision last year by the Sixth Circuit.[35] The Fifth and Eighth Circuits, and initially the Second Circuit, have found the language equally straightforward when applying it in immigration cases.[36] The Second, Third, Seventh, and Ninth Circuits have held to the contrary in immigration cases only, but in so doing they have relied upon a judicially inferred policy in favor of uniformity.[37] Indeed, in sentencing cases

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(1999); *Wilson*, 316 F.3d at 513 (the court "need look no further than the text of section 924(c)(2) to refute Wilson's argument"; "[T]here is no suggestion from the text of the statute itself that only those offenses that federal law punishes as felonies are eligible."); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997) (relying on statutory text); *United States* v. *Briones-Mata*, 116 F.3d 308, 309-310 (8th Cir. 1997) (per curiam) (contrary reading of text is "without merit"); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1340 (9th Cir. 2000) (relying on "the plain meaning of the text"), cert. denied, 531 U.S. 1102 (2001); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.) (reliance on plain text), cert. denied, 519 U.S. 885 (1996); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir.) (relying on the "plain language of the [Controlled Substances Act]"), cert. denied, 528 U.S. 844 (1999).

[35] See *United States* v. *Palacios-Suarez*, 418 F.3d 692, 699-700 (6th Cir. 2005) (relying on legislative history to require a hypothetical federal felony).

[36] See *Jenkins* v. *INS*, 32 F.3d 11, 14 (2d Cir. 1994) ("plain language" is "unequivocal[]"); *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir.) ("[T]he statutory language is clear."), cert. denied, 534 U.S. 935 (2001); 05-547 Pet. App. 4a (relying on "plain language" of the statute to adopt the same position in the immigration context as previously endorsed in the sentencing context); see also *Gerbier*, 280 F.3d at 318 (Reavley, J., dissenting) ("The words themselves seem to me to point to any state felony that would be conduct punishable under federal law.").

[37] See *Aguirre* v. *INS*, 79 F.3d 315, 317 (2d Cir. 1996) (relying on the perceived "interests of nationwide uniformity" in immigration law and avoiding "disparate treatment" of aliens); *Gerbier*, 280 F.3d at 310-311 (3d Cir.) (relying on "the legislative history of § 924(c)(2) and the need for uniformity in the immigration context"); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 535-536 (7th Cir. 2006) (expressing concerns about allowing state law "to determine matters that are at the heart of the federal immigration laws," and the perceived need to avoid "disuniformity" in immigration law); *Cazarez-Gutierrez* v. *Ashcroft*,

where that perceived policy does not apply, both the Second and Ninth Circuits continue to apply the plain reading of the exact same statutory language and hold that state-law drug felonies *are* aggravated felonies, whether or not the conduct would be punishable as a felony under federal law.[38] That pattern of judicial decisionmaking underscores that petitioners' hypothetical-federal-felony approach is not the product of statutory ambiguity, but of a policy argument in search of a textual home.

Moreover, the reliance of some courts, echoed by petitioners here (Lopez Br. 33-37; Toledo-Flores Br. 39-43), on a policy they perceive in favor of uniformity in immigration law is misplaced. First, such general notions cannot trump unambiguous text, like "any felony" in 18 U.S.C. 924(c)(2), and the INA's express inclusion of any offense "described in" the aggravated felony provision regardless of "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Second, the dispute here is not between uniformity and disuniformity. It is a dispute about different baselines for uniformity. The government's position, in accord with the statutory text, ensures uniformity in that only drug trafficking crimes that are both "felon[ies]"—offenses subject to a term of more than one year in prison—in the charging jurisdiction

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382 F.3d 905, 910-918 (9th Cir. 2004) (relying exclusively on interests in "national uniformity" and avoiding "inequitable consequences," and a finding that there was "nothing in the legislative history to rebut the presumption that Congress intended uniform application of the immigration laws").

[38] See *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-147 (2d Cir.), cert. denied, 528 U.S. 880 (1999); *Cazarez-Gutierrez*, 382 F.3d at 911; *Robles-Rodriguez*, 281 F.3d at 904-905; see also *Yanez-Garcia*, 23 I. & N. Dec. at 395 ("[T]he Second Circuit made clear in *Aguirre* [that] it adopted the Board's approach out of a desire for a uniform national rule, and not necessarily because it agreed with our interpretation of 18 U.S.C. 924(c)(2).").

and involve conduct that is "punishable under" the specified federal drug laws will trigger "aggravated felony" status.

Petitioners, by contrast, want to draw the line at requiring a conviction for conduct that would amount to a federal felony even if charged in a jurisdiction with materially different drug laws. However, petitioners' approach leads to substantial disuniformity and divergent outcomes for aliens who have engaged in the same conduct—such as the possession of 2000 pounds of marijuana—based on whether the defendant is charged in federal or state court, how States happen to structure their controlled substance laws, the extent to which state laws coincide with the design of federal law, and the amount of information recorded in a plea or conviction records, such as the amount and type of drugs involved. See, *e.g.*, 05-547 Gov't Pet. Stage Br. 4 n.3 (whether Lopez's conviction was for a federal felony turns upon information lacking from the record, such as the amount of cocaine and whether it was cocaine or cocaine base); see generally *Shepard* v. *United States*, 544 U.S. 13 (2005). A defendant arrested with such a significant quantity of drugs would normally be prosecuted in the federal system as a felon for possession with intent to distribute. See 21 U.S.C. 841(a). Many state statutes provide an analogous felony. But other States have chosen another option—denominating the crime possession, but punishing the possession of large amounts with significant prison time. As the text and structure of 8 U.S.C. 1101(a)(43)'s definition of "aggravated felony" attests, Congress was aware both that States are the primary enforcers of the criminal law within our federalist system, and that States formulate their criminal prohibitions in varied ways and in response to state-based interests and concerns. Against that backdrop, there is no sound reason that Congress would have wanted the felony classification of the same illicit drug activity to vary based on

the presence or absence of a directly and technically analogous federal felony.

Petitioners also argue (Lopez Br. 35; Toledo-Flores Br. 42-43) that failure to adopt the hypothetical-federal-felony approach would call into doubt the constitutionality of the statute. That argument is without merit. The Constitution empowers Congress "[t]o establish an uniform Rule of Naturalization," U.S. Const. Art. I, § 8, Cl. 4—*i.e.*, to enact a single set of standards to determine who may become a *citizen* of this Nation and of its several States. See *The Federalist* No. 42, at 269-271 (James Madison) (Clinton Rossiter ed. 1961). This case, however, involves the removal of aliens who commit crimes, not standards for citizenship.

Moreover, even if the Uniformity Clause applied to Congress's regulation of criminal aliens, it would not dictate that Congress address that problem without heed to state law, which, after all, is the primary source of criminal prohibitions. Quite the opposite, the Uniformity Clause "is not a straightjacket that forbids Congress to distinguish among classes," or to "recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Railway Labor Executive's Ass'n* v. *Gibbons*, 455 U.S. 457, 469 (1982) (applying the bankruptcy portion of the Uniformity Clause) (citation omitted).[39]

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[39] See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 873 (1995) (Thomas, J., dissenting) ("Even after Congress chose to exercise its power to prescribe a uniform route to naturalization, the durational element of the citizenship requirement in the Qualifications Clauses ensured that variances in state law would continue to matter."); *Toll* v. *Moreno*, 458 U.S. 1, 13 n.18 (1982) (state law can affect the employment of aliens "to the extent consistent with federal law") (citation omitted); see also *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 594 (1840) (opinion of Barbour, J.) ("The power of establishing a system of naturalization, and bankrupt laws, is contained in the same clause, and expressed, identically, in the same terms.").

2. Contrary to petitioners' arguments (Lopez Br. 37-38; Toledo-Flores Br. 38-39), the rule of lenity is not applicable here. First, that rule requires a "grievous ambiguity" in statutory text such that, "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted and punctuation altered). There is no such grievous ambiguity here. Petitioners do not dispute that the plain language of the relevant texts includes state felony convictions. Lopez Br. 28; Toledo-Flores Br. 11-12; 8 U.S.C. 1101(a)(43)(penultimate sentence). While petitioners, their amici, and some courts have identified policy reasons for favoring narrower coverage of state-law offenses, those arguments have no anchor in statutory text. The rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

Second, even if applicable, the rule of lenity would not point in any particular direction in this case. While petitioners' hypothetical-federal-felony approach would benefit them, it would harm other aliens who, for example, were convicted of an offense that is a misdemeanor under state law, but a felony under federal law, either in its own right or due to a recidivist provision.[10]

Perhaps a court could devise a position that would require every possible distinguishing factor to be resolved in favor of a criminal alien. But there is no textual basis for layering multiple conditions and qualifications on a statute that applies to "any felony," "whether in violation of Federal or State law."

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[10] See *Yanez-Garcia*, 23 I. & N. Dec. at 392 n.3 ("[T]he hypothetical approach * * * could, under certain circumstances, result in unduly harsh consequences for persons convicted of misdemeanors under state law."); *United States* v. *Simpson*, 319 F.3d 81, 85-86 (2d Cir. 2002); *Gerbier*, 280 F.3d at 311 n.12.

See *Smith*, 508 U.S. at 239 ("The mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable."). The rule of lenity has never been held to require the type of heads-the-alien-wins; tails-the-government-loses approach to statutory construction that petitioners and their amici advocate. Rather, the principle comes into play, if at all, only "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (citation omitted).

CONCLUSION

The petition for a writ of certiorari in No. 05-7664 should be dismissed as moot. The judgment of the court of appeals in No. 05-547 should be affirmed. Alternatively, the judgments of the court of appeals in both cases should be affirmed.

Respectfully submitted.

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AUGUST 2006

APPENDIX A

UNITED STATES DISTRICT COURT
For the Southern District of Texas
Holding Session in Laredo

Case Number: 5:04CR00546-001
USM NUMBER: 35331-179

UNITED STATES OF AMERICA, PETITIONER

v.

REYMUNDO TOLEDO-FLORES, RESPONDENT

Filed: Sept. 10, 2004
Entered: Sept. 17, 2004

JUDGMENT IN A CRIMINAL CASE

☐ See Additional Aliases. — Raul Martinez
THE DEFENDANT: — Defendant's Attorney

☒ pleaded guilty to count(s) — one on May 3, 2004

☐ pleaded nolo contendere to count(s) which was accepted by the court. — _____

☐ was found guilty on count(s) after a plea of not guilty. — _____

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1325	Illegal entry (felony)	02/22/2004	One

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 9, 2004
Date of Imposition of Judgment

/s/ GEORGE P. KAZEN
GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

[9/10/04]
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

The defendant was advised of the right to appeal the sentence, including the right to appeal in forma pauperis, upon proper documentation

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendation to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on_____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 1 year.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as deter-

mined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if appropriate.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payment sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer to schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payment on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)*

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

☐ If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment

options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment at not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapter 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of $ _____ over a period of _____ , to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of $ _____ over a period of _____ , to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to U.S. District Clerk, P.O. Box 597, Laredo, TX 78042-0597

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

- ☐ See Additional Defendants and Co-Defendants Held Joint and Several.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
- ☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties and (8) costs, including cost of prosecution and court costs.

APPENDIX B

SUBCHAPTER I—GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses); or

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[2] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offenses described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18 (relating to peonage, slavery, and involuntary servitude);

---

[1] So in original. Probably should be preceded by "is".

[2] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information); 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.[3]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is

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[3] So in original. Probably should be followed by a semicolon.

described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

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No. 05-547

FILED
SEP 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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September 2006

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No one disputes that simple possession of a controlled substance is not "illicit trafficking" as that term is ordinarily understood and used in federal statutes. This case thus turns on whether a "drug trafficking crime," which is defined as "any felony punishable under the Controlled Substances Act," 18 U.S.C. § 924(c), plainly includes "any misdemeanor punishable under the Controlled Substances Act" that is punishable as a felony under state law. The straightforward answer to this question is "no." The government's interpretation strains the statutory language and disregards established rules of statutory construction. The government's original interpretation, to which it adhered for more than a decade, is correct: a drug offense is an "aggravated felony" for immigration purposes if it involves illicit trafficking or the defendant's actions are a felony under the Controlled Substances Act (or two other federal drug statutes).

I. A Simple Possession Offense Punishable As A Misdemeanor Under The Controlled Substances Act Is Neither "Illicit Trafficking" Nor "A Drug Trafficking Crime."

A. The Ordinary Meaning Of "Illicit Trafficking" Does Not Include Simple Possession Offenses.

The Immigration and Nationality Act defines an "aggravated felony" to include "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(B). Simple possession of a controlled substance is not "illicit trafficking" as that term is ordinarily defined. *See, e.g.*, Black's Law Dictionary 1534 (8th ed. 2004) ("traffic" means "[t]o trade or deal in goods esp. illicit drugs or other contraband); 21 U.S.C. § 862 (defining "traffickers"

as individuals "convicted of any Federal or State offense consisting of the distribution of controlled substances"); *see generally* Lopez Br. 18-20.[1] No court has held, and the government does not argue, that simple possession offenses are "illicit trafficking" within the usual meaning of that term. Thus, Lopez's simple possession offense is not an aggravated felony unless it is a "drug trafficking crime" as defined in 18 U.S.C. § 924(c).[2]

B. A "Drug Trafficking Crime" Is Conduct That Violates A Felony Provision Of The Federal Drug Laws.

Section 924(c) of Title 18 is a criminal statute, not an immigration statute. It defines the substantive offense of using or carrying a firearm during or in relation to a "drug trafficking crime" or a "crime of violence." It provides: "For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act" or two other federal drug statutes. 18 U.S.C. § 924(c)(2). The most natural reading of this language is that a "drug trafficking crime" is an offense that is punishable as a felony under the

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[1] Federal law prohibits both illicit trafficking and simple possession, but distinguishes between the two types of offenses and punishes trafficking offenses more severely. *Compare, e.g.*, 21 U.S.C. § 841 *with id.* § 844. This case involves a simple possession offense rather than a trafficking offense. J.A. 16, 20-21. Lopez aided and abetted possession by a third party, Juan Valdez, by telling Valdez where he could obtain drugs. Pet. App. 13a. After Valdez was arrested, Lopez loaned $600 to Valdez's brother, at the brother's request, to post bond for Valdez. Juan Valdez later returned the money to Lopez. Police then searched Lopez's residence and found the $600 but no drugs. *Id.*

[2] Petitioners' amici develop the argument that that non-trafficking offenses, including non-trafficking offenses punished as felonies under the CSA, are not "aggravated felonies" for purposes of the INA. *See, e.g.*, ABA Br. 8-10; Immigrant Defense Project Br. 6-28.

Controlled Substances Act. The government arrives at its interpretation by parsing the terms "any felony" and "punishable" in isolation. But the Court does not interpret words "in isolation"; doing so violates "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (citation omitted). The government's assertion (U.S. Br. 19) that "[n]o modifier" limits the phrase "any felony" in section 924(c) is plainly incorrect: "any felony" is modified and limited by the phrase "punishable under the Controlled Substances Act." It is not just "any felony" that is a drug trafficking crime, but a felony "punishable under the Controlled Substances Act." As shown below (pp. 5-12), state felony convictions are not "punishable" under the federal drug laws.

1. The government concedes that the Title 21 definition of "felony" does not apply.

One of the government's "plain language" arguments is easily dealt with, because the government itself now agrees that it is wrong. The government had argued that the term "felony" in section 924(c) must include state-law felonies because a provision of Title 21 provides: "As used in this subchapter . . . [t]he term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13). *See, e.g.*, *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 534 (7th Cir. 2006) ("the government points to the definitions section of the Controlled Substances Act."). The court of appeals accepted this argument, *see* Pet. App. 4a, as have other

courts that have adopted the government's interpretation.[3]

The government now agrees that it was wrong to make this argument, and the lower court was wrong to accept it. *See* U.S. Br. 25 ("We agree with Lopez . . . that the term 'felony' in Section 924(c)(2) takes its meaning from the framework of Title 18, rather than from Title 21."). The government also agrees with Lopez's reasons for this conclusion: By its terms, the Title 21 definition applies only to Title 21; Section 924(c) is a provision of Title 18, which classifies federal crimes as felonies or misdemeanors based upon the authorized term of imprisonment. *See* 18 U.S.C. § 3559. Moreover, neither section 924(c) nor the INA's aggravated felony provision incorporates the Title 21 definition of "felony." *See* Lopez Br. 25-27; U.S. Br. 25-27. The government adds that the Title 18 definition of "felony" is preferable because it "provides a level of uniformity to the definition of drug trafficking crime." *Id.* at 27.

Because the Title 21 definition of "felony" does not apply to section 924(c), it provides no support for the government's position that "felony" in section 924(c) includes state felonies as well as federal felonies.[4]

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[3] *See United States* v. *Palacios-Suarez*, 418 F.3d 692, 696 (6th Cir. 2005); *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 398 (B.I.A. 2002) (same).

[4] The government's recognition that uniformity is desirable undermines its position in this case. There is no dispute that federal law provides uniform definitions of "controlled substance," "punishable" offenses, and—the government now agrees—"felony." Having applied a uniform federal approach, and recognized that this approach is desirable, it makes little sense to depart from the uniform federal classification of Controlled Substances Act offenses into felonies and misdemeanors in favor of non-uniform state classifications of these offenses.

2. A state felony conviction (as opposed to the conduct underlying the conviction) is not "punishable under" federal drug laws.

The phrase "any felony under the Controlled Substances Act" plainly refers to a felony violation of that Act. Congress's addition of the word "punishable" ("any felony *punishable* under the Controlled Substances Act") specifies that an actual conviction (*i.e.*, punishment) under the Controlled Substances Act is not necessary. The addition of "punishable" does not expand the scope of "drug trafficking crime" to include misdemeanors under the Controlled Substances Act.

The government acknowledges that "the plain meaning of 'punishable under' the Controlled Substances Act is that the criminal *conduct* is susceptible to sanction under federal law." U.S. Br. 17 (emphasis in original). *See* Lopez Br. 24-25; *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 488 (1985) (acts "punishable under" federal law "consist[] not of acts for which the defendant has been convicted, but of acts for which he could be.") The government fails to recognize that the plain meaning of "punishable under" conflicts with its interpretation of section 924(c). As Judge Posner, writing for the Seventh Circuit, has explained, a violation of state drug laws is not *itself* "punishable under" the Controlled Substances Act. *See Gonzales-Gomez*, 441 F.3d at 534 ("The Controlled Substances Act does not purport to punish state drug felonies."). Rather, it is the *conduct* underlying the state law conviction that may be "punishable under" the act. Thus, the government's interpretation does not fit the statutory language.

The government does not respond directly to this argument, instead asserting (U.S. Br. 19) that "Petitioners cannot mean what they say" because they agree "that some state-law controlled substance

convictions qualify as convictions for 'drug trafficking crime[s].'" The government misstates Petitioners' argument. Petitioners do *not* agree that state-law convictions or state-law felonies are "punishable under the Controlled Substances Act." Instead, Petitioners' argument is that the *conduct* underlying a state-law conviction may be a drug trafficking crime if it could be punished as a felony under the Controlled Substances Act.

The government asserts (U.S. Br. 30) that Lopez's interpretation of section 924(c) is unprecedented because it "turns not on whether the offense is a 'felony' in the convicting jurisdiction, but rather on whether it would be a felony if prosecuted in a different jurisdiction (*i.e.*, under federal law)." The government's focus on the "convicting jurisdiction" is misplaced, because section 924(c) does not require or even refer to a drug trafficking "conviction." The government need only prove that the defendant committed a drug trafficking crime, not that he was convicted of the crime. *See United States* v. *Munoz-Fabela*, 896 F.2d 908, 910 (5th Cir. 1990); *United States* v. *Hunter*, 887 F.2d 1001, 1003 (9th Cir. 1989); U.S. Br. 17-18 & n.9.

Congress has shown that it knows how to refer to a "conviction," including a state-court conviction, when it wishes to do so. *See, e.g.*, 18 U.S.C. § 924(e)(1) (person who has "three previous convictions by any court referred to in section 922(g)(1) . . . for a violent felony or a serious drug offense"); *id.* § 922(g)(1) (person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year"). Congress used no such language in section 924(c), and thus the

government's "convicting jurisdiction" argument lacks a textual basis.[5]

3. Other provisions of section 924(c) confirm that a "drug trafficking crime" is a federal felony.

"The Court generally assume[s], in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome* v. *United States*, 318 U.S. 101, 104 (1943) (holding that the term "felony" in the federal bank robbery statute does not incorporate state law). Here, there is no "plain indication" that Congress intended to make the application of section 924(c) dependent on state law. To the contrary, the statute contains several indications that Congress had no such intention.

a. Section 924(c), by its terms, applies "to any crime of violence or drug trafficking crime . . . *for which the person may be prosecuted in a court of the United States*." 18 U.S.C. § 924(c)(1) (emphasis added). A person may be prosecuted in a court of the United States only for federal crimes, not state crimes. Accordingly, the Court has held that this language "expressly" limits "the phrase 'any crime' to only federal crimes." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *see also* U.S. Br. in *Gonzales* at 15 (section 924(c) "does not reach using or carrying a firearm during a state-law violation").

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[5] Even if section 924(c) did require a "conviction," Petitioner's interpretation is hardly unprecedented. Many States, in applying their recidivist sentencing statutes, look to whether a conviction would be a felony in the forum State rather than the convicting State. *See* Br. of Texas at 11, citing Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257, 269 (2005).

The government is thus driven to argue that, even though 924(c) is limited to federal-law violations, the definition of "drug trafficking crime" in section 924(c)(2)—considered in isolation—includes state-law violations. Again, however, courts do not interpret statutory phrases in isolation. Moreover, section 924(c)(2) defines "drug trafficking crime" "for purposes of this subsection." Congress is unlikely to have adopted a definition "for purposes of this subsection" that includes state-law violations. In addition, the INA's aggravated felony provision refers to a drug trafficking crime "as defined in section 924(c)" as a whole, not in "section 924(c)(2)." 8 U.S.C. § 1101(a)(43).

The government asserts (U.S. Br. 21-22) that the "court of the United States" language is surplusage unless it serves to limit the definition of "drug trafficking crime" to federal crimes. But an earlier version of section 924(c) included *both* the "court of the United States" language *and* a definition of "drug trafficking crime" that unquestionably was limited to federal crimes. *See* 18 U.S.C. § 924(c) (1982 & Supp. 1986). Moreover, the government itself offers an explanation of the "court of the United States" language: "Crimes of violence" are not defined by reference to specific federal criminal statutes, and therefore the reference to "crimes punishable in a court of the United States" serves to limit "crimes of violence" to federal crimes. U.S. Br. 22 n.15.

In any event, the government's proposed interpretation would *not* limit section 924(c) prosecutions to federal felonies. The government interprets "drug trafficking crime" to include any state felony that is punishable as misdemeanor under the Controlled Substances Act. Of course, defendants may be "prosecuted in a court of the United States" for federal misdemeanors. Thus, under the government's reading, section 924(c) criminalizes using and carrying a firearm

during a federal misdemeanor in a State that classifies the offense as a felony.[6]

b. A person who violates section 924(c) "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, . . . be sentenced to a term of imprisonment" ranging from "not less than 5 years" to life, depending upon circumstances specified in the statute. 18 U.S.C. 924(c)(1). Because the purpose of section 924(c) is to establish the minimum punishment imposed by federal courts for federal crimes, Congress clearly intended to refer to federal felonies—*i.e.*, felonies punishable by a federal court.

The government argues (U.S. Br. 29) that if Congress had intended to limit the definition of "drug trafficking crime" to felony violations of the Controlled Substances Act, it would have defined "drug trafficking crime" as "any felony punishable *as such* under the Controlled Substances Act." While the inclusion of "as such" would have provided Petitioner with an air-tight reading of § 924(c)(2), its omission does not support the government's "plain meaning" argument. Because § 924(c) deals only with the punishment of federal crimes by federal courts, "as such" was not necessary to clarify that state law felonies that are misdemeanors under the Controlled Substances Act are not "drug trafficking crime[s]."

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[6] Congress used the same definition of "drug trafficking crime" in section 929(a) of Title 18, and has incorporated the definition by reference in many other provisions of Title 18. *See* 18 U.S.C. §§ 929(a); 844(o) (referring solely to § 924(c)(2)); 1028(b)(3)(A) (referring solely to § 929(a)(2)); 1425(b); 1426(h); 1427; 1541; 1542; 1543; 1544; 1546(a); 1547(1); 4042(b)(3)(A). The government's interpretation would broaden the scope of these federal criminal offenses as well.

c. Elsewhere in section 924, Congress used exactly the same "punishable under the Controlled Substances Act" language, but added a separate, explicit reference to state law violations. *See* 18 U.S.C. § 924(g) ("conduct which . . . is punishable under the Controlled Substances Act" or "violates any State law relating to any controlled substance"); *id.* § 924(k) (same); *id.* § 924(e) "an offense under the Controlled Substances Act" or "an offense under State law"). The government's efforts to explain away these textual differences are unpersuasive. For example, it asserts that the term "offense under the Controlled Substances Act" is more "restrictive" than "felony punishable under the Controlled Substances Act." But the term "offense" includes misdemeanors, and thus is *less* restrictive than "felony." The common-sense reading of the statutory text is that when Congress wished to include state law offenses in section 924(c), it explicitly referred to them. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983).

C. The Government's Interpretation Creates A Conflict With The INA's Provision That A Single Offense Of Simple Possession Of Marijuana Is Not A Basis For Deportation.

The INA provides that "a single offense involving possession for one's own use of 30 grams or less of marijuana" is not a basis for deportation. 8 U.S.C. § 1227(a)(2)(B)(i). As Lopez's opening brief explains (pp. 28-29), this express provision undercuts the government's interpretation of Section 924(c). Under the government's interpretation, a first offense of simple possession of marijuana may be a basis for deportation. Not only that, it may be an aggravated felony that renders the individual ineligible for cancellation of removal or asylum.

The government's response, buried in a footnote (U.S. Br. 35 n.30), is unconvincing. The government acknowledges that it may be necessary for a court to

determine "whether the later enacted and specific personal-use exception . . . overrides the general language of the aggravated felony provision." U.S. Br. 36 n.30. The government overlooks the basic principle that statutes should be interpreted, whenever possible, to avoid such conflicts. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

The government tries to minimize the practical importance of this conflict, but courts avoid interpretations that create conflicts without determining their practical importance. *See id.* ("[C]ourts are not at liberty to pick and choose among congressional enactments."). Moreover, the conflict here appears to be of considerable practical importance. The government acknowledges that four States (including Florida) punish a first offense of possession of an ounce or less of marijuana as a felony. At least one additional State punishes possession of more than an ounce of marijuana as a felony. *See* Ga. Code Ann. §§ 16-13-2(b), 16-13-30(j). (Thirty grams is more than one ounce.) Although the government asserts that it is unaware of any case in which a noncitizen has been deported for a first offense of possession of 30 grams or less of marijuana, it does not state how thoroughly it has searched for such cases. Nor does it explain why it is appropriate for the Executive Branch to ignore an entire class of offenses that, in its view, Congress has defined as aggravated felonies.

The provisions of the INA, considered together, indicate that Congress established a graduated series of consequences for drug offenses: (i) no consequences for a first offense of simple possession of marijuana; (ii) deportation for most other simple possession offenses with the possibility of discretionary relief; and (iii) mandatory deportation, denial of asylum, and other

consequences for drug trafficking. Petitioner's interpretation fits this pattern; the government's interpretation does not.

D. The INA Does Not Alter The Definition Of "Drug Trafficking Crime" In Section 924(c).

The government argues that a simple possession offense may be an aggravated felony even if it is neither "illicit trafficking" nor a "drug trafficking crime" as defined in section 924(c). This argument departs from the plain text of the INA.

In support of its counter-intuitive argument, the government relies on the INA's provision that "[t]he term ['aggravated felony'] applies to an offense described in this paragraph whether in violation of Federal or State law" (or the law of a foreign country). 8 U.S.C. § 1101(a)(43). This provision cannot do the work the government wants it to do. It clearly provides that an "aggravated felony" must be "an offense described" in Paragraph (a)(43). For example, Paragraph (a)(43)(D) provides that "an offense described in section 1956 of Title 18 (relating to laundering of money instruments)" is an aggravated felony if the amount of the funds exceeds $10,000. A violation of state law is an aggravated felony so long as it is an "offense described" in Paragraph (a)(43)(D), *i.e.*, so long as it is money laundering under 18 U.S.C. § 1956. But state law cannot alter the *description* of the offense in Paragraph (a)(43)(D). If a State adopted an expanded definition of "money laundering," it would not alter the description of the offense in Paragraph (a)(43)(D).

Similarly, Paragraph (a)(43)(B) describes the offense of "illicit trafficking in a controlled substance . . . including a drug trafficking crime." The INA describes the "drug trafficking crime" offense by incorporating—in its entirety and without any change—the definition of "drug trafficking crime" in 18 U.S.C. § 924(c). Because that definition is limited to acts punishable as a felony

under the federal drug statutes, it cannot be altered or expanded by state law.

"Whether in violation of Federal or State law" serves an important function by specifying that a state-law conviction is an aggravated felony conviction if the conduct underlying the conviction violated a felony provision of the Controlled Substances Act. That language does not—and by its terms cannot—alter the description of "drug trafficking crime" to include conduct punishable as a misdemeanor under the Controlled Substances Act.

The government asserts (U.S. Br. 31) that "the question here is not the meaning of Section 924(c) standing alone . . . but rather as incorporated *mutatis mutandis*—that is, with all necessary changes having been made—into 8 U.S.C. § 1101(a)(43)." Because Congress expressly provided in the INA that an illicit trafficking includes a drug trafficking crime "*as defined in section 924(c) of title 18*," 8 U.S.C. § 1101(a)(43)(B) (emphasis added), the government's "*mutatis mutandis*" argument is refuted by the plain statutory language. This case is quite different from the two cases cited by the government. In *Shalala* v. *Illinois Council on Long-Term Care, Inc.*, 529 U.S. 1 (2000), and *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), the Court did not construe a statutory provision that used a term "as defined in" another provision. Moreover, the Court's interpretation in those cases was based on "specific evidence of Congress' intent," as well as on the Court's recognition that "a 'serious constitutional question' . . . would arise" if the statute were construed to deny judicial review of constitutional claims. *Illinois Council*, 529 U.S. at 16-17; *Michigan Academy*, 476 U.S. at 679-81 & n.12. No such considerations support the government's argument here.

II. The Legislative History Supports Petitioner's Reading Of The Statutory Text.

For the reasons set forth in Part I above and in Lopez's opening brief, the statutory text supports Lopez's interpretation rather than the government's. The government's contention that its current position is compelled by plain statutory language is particularly implausible in view of the fact that multiple courts have adopted Lopez's interpretation, as did the government itself for more than a decade. *See* U.S. Reply Br. in *Liao* v. *Rabbett*, 398 F.3d 389 (6th Cir. 2005) ("[T]he statutes here are ambiguous, as shown by the existence of the different potential readings cited in this case, as well as by the split in the circuits."); *see generally Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("in light of" conflicting lower court opinions, "it would be difficult indeed to contend" that statutory language is unambiguous).[7]

There is no dispute that the pre-1988 definition of "drug trafficking crime" ("any felony violation of federal law involving the distribution, manufacture, or importation of any controlled substance") was limited to federal crimes. *See Busic* v. *United States*, 446 U.S. 398, 414 (1980) ("A primary objective of § 924(c), as explained by its sponsor, Representative Poff, was to 'persuade the man who is tempted to commit a *Federal felony* to leave his gun at home.'" quoting 114 Cong. Rec. 22231 (1968)

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[7] The government incorrectly asserts that the lower courts adopting Petitioner's interpretation have relied solely on interpretive canons, such as the canon favoring uniformity in immigration law, rather than statutory language. *See, e.g.*, *Gonzales-Gomez*, 441 F.3d at 533 (government's interpretation "is a strained reading of the statutory language"); *Palacios-Suarez*, 418 F.3d at 698-99 (6th Cir. 2005) (carefully analyzing statutory language); *Gerbier* v. *Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (same).

(emphasis added)). The revised definition was adopted in a provision entitled "Clarification of Definition of Drug Trafficking Crimes." Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988). The purpose of the clarification, according to the Chairman of the Senate Judiciary Committee and a principal drafter of the amendment, was to make clear that "drug trafficking crime" includes "possession with intent to distribute," as well as "attempt and conspiracy violations." 134 Cong. Rec. S17,360, S17,363 (1988) (statement of Sen. Biden).

The government nevertheless argues that the 1988 amendment expanded the definition of "drug trafficking crime" to include state law felonies punishable as misdemeanors under the Controlled Substances Act. If Congress had intended such a significant change, it is likely there would have been some recognition of it. *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes.").

Nor does the government dispute that the 1998 amendments to section 101(a)(43) of the INA were intended to codify *In re Barrett*, 20 I. & N. Dec. 171, 177-78 (B.I.A. 1990), which held that the definition of "drug trafficking crime" "encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act." The government tries to dismiss this history on the ground that there is no affirmative statement that Congress intended to require that the state conviction be "analogous" to a federal offense. But Congress is presumed to know the law, *see Cannon* v. *University of Chicago*, 441 U.S. 677, 696-99 (1979), and it codified the decision in *Barrett* without indicating any disagreement with its requirement that the state offense must be "analogous" to an offense under the Controlled Substances Act. Moreover, subsequent BIA decisions expressly held that the offense must be analogous to a felony offense under that Act. *See, e.g., In re Davis*, 20 I.

& N. Dec. 536 (B.I.A. 1992). Thereafter, Congress amended the INA, including section 101(a)(43), but it never expressed disagreement with this position. *See Yanez-Garcia*, 23 I. & N. Dec. at 405 (Rosenberg & Espenoza, concurring in part and dissenting in part) ("[O]ur interpretation of § 924(c)(2) has been implicitly reaffirmed by Congress, which took no action in its comprehensive revisions of the Act in 1996 to amend section 101(a)(43)(B) of the Act or to alter our interpretation of that provision."). *See generally Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

III. Canons of Statutory Interpretation and Policy Considerations Support Petitioner's Interpretation.

Lopez's opening brief identifies a series of well-established principles of statutory interpretation that weigh in favor of Petitioners' interpretation: (i) immigration statutes are construed to ensure uniform treatment of immigrants, (ii) ambiguities in immigration statutes are resolved against deportation; (iii) federal criminal statutes are presumed to have a uniform meaning; and (iv) ambiguities in criminal statutes are resolved in favor of lenity. *See* Lopez Br. 33-38. The government's primary response—that these canons do not apply because its interpretation is required by the plain statutory language—is wrong for the reasons stated above.

a. The government acknowledges that uniform treatment of immigrants is desirable, and does not dispute that its interpretation produces striking non-uniformity. Under the government's interpretation, simple drug possession is an aggravated felony under

federal immigration law only in those States that choose to treat the offense as a felony.[8]

The government's only response is to assert that Lopez's interpretation also produces some non-uniformity, because some States punish trafficking offenses by imposing lengthy sentences for possession of large quantities of controlled substances, without expressly finding that the defendant manufactured or distributed drugs. The government argues that these individuals will escape treatment as aggravated felons under Lopez's interpretation.

The non-uniformity the government identifies is not comparable to the non-uniformity that results from its interpretation. First, States that punish possession of large amounts of controlled substances frequently give state prosecutors the option of charging defendants with a drug trafficking offense.[9] Second, when an individual has been convicted of possession of a large quantity of illegal drugs, it may be possible to ascertain from the indictment or jury instructions that the defendant was found to have engaged in manufacturing or distribution, or intended to

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[8] The government argues (U.S. Br. 47) that the Uniformity Clause of the Constitution applies only to "standards for citizenship." Whether or not that is so, this case does concern standards for citizenship. One of the requirements for naturalization is that the person must be "of good moral character." 8 U.S.C. § 1427(a)(3). Congress has specifically provided that no person who has been convicted of an aggravated felony may be found to be of good moral character. *Id.* § 1101(f)(8).

[9] *See* Alaska Stat. § 11.71.030(a)(1) (possession with intent to manufacture or deliver); Ariz. Rev. Stat. Ann. § 13-3408(A)(2) (possession for sale); Del. Code Ann. tit. 16, § 4751(a) (possession with intent to manufacture or deliver); La. Rev. Stat. Ann. § 40:967 (possession with intent to distribute); Miss Code Ann. § 41-29-139(a)(1) (possession with intent to distribute); Tex. Health & Safety Code Ann. § 481.112(a) (possession with intent to deliver).

do so. *See Shepard* v. *United States*, 544 U.S. 13 (2005); *Taylor* v. *United States*, 495 U.S. 575 (1990). Third, *any* drug conviction (other than a single offense involving possession of 30 grams or less of marijuana) is a basis for deportation. 8 U.S.C. § 1227(a)(2)(B)(i). In deciding whether to grant discretionary cancellation of removal, the immigration judge can decline to grant relief to individuals who appear to have engaged in trafficking offenses. In contrast, the government has no discretion to achieve uniformity by granting relief to individuals convicted of aggravated felonies. *See* Lopez Br. 3-4; Asian American Justice Center Br. 11-26.

b. This Court's decisions applying the rule of lenity have not generally required a "grievous" ambiguity, *e.g.*, *Castillio* v. *United States*, 530 U.S. 120, 131 (2000) (Court need only be "genuinely uncertain as to Congress' intent"), but Petitioner is entitled to the benefit of the rule under any formulation. The government argues that Lopez's interpretation is more lenient to some individuals (those convicted of state felonies that are federal misdemeanors) but less lenient to others (those convicted of state misdemeanors that are federal felonies). This goes to the immigration consequences of an aggravated felony conviction, but the rule of lenity is a criminal law doctrine that applies to the interpretation of the criminal statute at issue in this case—section 924(c) of Title 18. Lopez's interpretation is more lenient to criminal defendants. There is no ambiguity about whether the word "felony" in section 924(c) includes federal felonies, but only whether "felony" also includes state law felonies punishable as federal misdemeanors.[10]

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[10] The American Bar Association describes the difficulties that arise if a state misdemeanor conviction is deemed to be an aggravated felony conviction for immigration law purposes. ABA Br. 14-24. That issue, which is not before the Court in this case, is not confined to "drug (continued...)

The government objects to a "heads-I-win, tails-you-lose" approach to interpreting the aggravated felony provisions, but it has taken exactly that approach. As the Seventh Circuit recently remarked, the "only consistency" that can be discerned "in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzales-Gomez*, 441 F.3d at 535. The government has argued that "whether a particular offense constitutes 'sexual abuse of a minor' for purposes of classification as an aggravated felony is a matter of federal law rather than state law." *Id.* It has argued—contrary to its position here—that a state drug possession offense is an aggravated felony if it is classified as a felony by the State, even where the maximum sentence is probation. *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002). *See also Liao* v. *Rabbett*, 398 F.3d at 390 (same). And it has argued that a state misdemeanor drug offense is an aggravated felony if punishable by more than a year. *United States* v. *Amaya-Portillo*, 423 F.3d 427, 432 (4th Cir. 2005).

c. The government's assertion (U.S. Br. 32) that Lopez's interpretation of the statute is "unworkable" is incorrect. The BIA adopted and used Lopez's interpretation for 12 years, and it remains in use in five circuits. *See* Lopez Br. at 8. If the interpretation were "unworkable" it would have broken down long ago. Contrary to the government's assertion, the BIA did not abandon its prior interpretation as "unworkable." Instead, the Board determined that "uniformity is presently unattainable" because of the split in the circuits, and concluded that "the best approach is one of

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trafficking" aggravated felonies, but arises with respect to numerous other categories of aggravated felonies defined by reference to specific provisions of federal law. *See* 8 U.S.C. § 1101(a)(43)(D), (E), (H), (I), (J), (K), (L), (N), (O), (P).

deference to applicable circuit authority." *Yanez-Garcia*, 23 I. & N. Dec. at 395-96. The Board noted, as an additional reason for changing course, that the federal felony approach presents some "analytical difficulties," but that is far from finding the approach unworkable. *See id.* at 405 (Rosenberg & Espenoza, concurring in part and dissenting in part) (government's prior interpretation "has been applied to literally thousands of cases"). Some "analytical difficulties" are inevitable when state offenses must be compared to federal offenses. *See, e.g., Taylor*, 495 U.S. at 595-602 (adopting a uniform federal definition of "burglary" under 18 U.S.C. § 924(e)). Indeed, the governments' amici note that most States use an analog to the federal felony approach to sentence recidivists. *See* Br. of Texas, *et al.* at 11.

Conclusion

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 05-547 and 05-7664

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REYMUNDO TOLEDO-FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JOSE ANTONIO LOPEZ

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INTEREST OF *AMICUS*[1]

The American Bar Association ("ABA") is the voluntary, national membership organization of the legal profession. Its more than 407,000 members, from every state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer associates in allied fields.[2] Since its inception, the ABA has actively promoted improving the administration of justice. The ABA has also long been committed to protecting the constitutional and statutory rights of non-citizens. The ABA respectfully submits this brief *amicus curiae* because the question presented by this case implicates matters addressed by the ABA Standards for Criminal Justice and other policies adopted by its House of Delegates. Resolution of this case, furthermore, has implications for the administration of criminal justice and for the uniform application of immigration law.

Over more than thirty years, the Standards have been developed, refined, and approved by ABA task forces made up of prosecutors, judges, defense lawyers, academics, and others, and by the ABA's wider and diverse membership. An experienced group of prosecutors, defenders, and judges has agreed upon this considered collection of "best

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

practices."[3] This Court has relied upon the Standards as a guide to criminal justice administration. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2805-06 (2005); *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-66 (2005); *INS v. St. Cyr*, 533 U.S. 289, 322 n.48 (2001). Policy resolutions of the House of Delegates, a broadly representative forum for the legal profession, also represent a consensus of the ABA's diverse membership.

Among the ABA policies implicated by this case are, most directly: the Standards on Collateral Sanctions; policies concerning relief from deportation as a collateral consequence of a criminal conviction; and a recently adopted policy concerning the scope of the "aggravated felony" ground for deportation. Other relevant ABA policies are noted in the body of this brief.

The Standards on Collateral Sanctions recognize that the collateral consequences of a criminal conviction should be commensurate with the gravity of the offense. They further recognize that a relief mechanism should be available unless imposition of the collateral consequences at issue is warranted in all circumstances. These Standards state in relevant part:

> [T]he objectives of this chapter are to . . . limit collateral sanctions imposed upon conviction to those that are specifically warranted by the conduct constituting a particular offense . . . prohibit certain collateral sanctions that, without justification, infringe on fundamental rights, or frustrate a convicted person's chances of successfully reentering society . .

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[3] Chief Justice Warren Burger described the Criminal Justice Standards project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251 (1974).

> . and . . . provide a judicial or administrative mechanism for obtaining relief from collateral sanctions.

ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-1.2 (3d ed. 2004).

> The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.

Id. Standard 19-2.2.

In addition, for over thirty years, ABA policy has advocated that discretionary relief from deportation be available to non-citizens convicted of crimes based on equities such as family ties and length of residence in the United States. *See* 100 ABA Ann. Rep. 642, 663 (1975); *see also* ABA Criminal Justice Section & Commission on Immigration, Report 300 to the House of Delegates, at 1 (Feb. 2006), http://www.abanet.org/crimjust/policy/my06300.pdf ("ABA Report 300") (urging restoration of discretion to immigration judges to grant deportation relief).

And in February 2006, the ABA House of Delegates adopted a resolution urging that low-level offenses not be deemed "aggravated felonies" (which carry the collateral consequence of mandatory deportation):

> [T]he American Bar Association urges federal immigration authorities to avoid interpretations of the federal immigration laws that extend the reach of the 'aggravated felony' mandatory deportation ground to . . . low-level state offenses that either are

misdemeanors under state law or would be misdemeanors under federal law.

ABA Report 300 at 1.

SUMMARY OF ARGUMENT

The question presented in this case is whether a drug possession offense that is a felony under state law, but would be a misdemeanor under federal law, is an "illicit trafficking" "aggravated felony" within the meaning of the Immigration and Nationality Act (INA).[4] Resolution of this question also has implications for whether certain possession offenses that are not felonies under state law may nevertheless be deemed "illicit trafficking" "aggravated felonies." This *amicus curiae* brief offers an approach to the statute that is coherent as to both types of offenses.

Some courts have deemed offenses such as Petitioner's, that do not involve trafficking and would be misdemeanors under federal law, to be illicit trafficking aggravated felonies because the offenses are state-law felonies. Other courts have deemed offenses that do not involve trafficking and are second or subsequent state-law misdemeanors to be illicit trafficking aggravated felonies, because repeat misdemeanors may be prosecuted as federal-law felonies. Properly read, the illicit trafficking aggravated felony provision does not support including either type of offense.

The statutory text, structure, and history dictate reading the illicit trafficking aggravated felony provision as limited to felonies actually involving trafficking. Simple possession does not constitute "illegal trafficking." Also, in order to be

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[4] The ABA submits this brief in support of Petitioner Jose Antonio Lopez ("Lopez"), but arguments relevant to Petitioner Reymundo Toledo-Flores ("Toledo-Flores") also support reversal in that case. *See Leocal v. Ashcroft*, 543 U.S. 371, 380 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.").

an "aggravated felony," a state offense must as a threshold matter be a felony under state law. *See infra* Section I.

Imposing mandatory deportation and other harsh immigration consequences for low-level possession offenses results in a drastic disparity between the direct and collateral consequences of such convictions. This leads not only to individual injustices but also to unanticipated adverse consequences for the integrity and fair and regular operation of the criminal justice system. These concerns support application of the rule of lenity, which requires that any lingering ambiguities in the statute be construed against deportation. These same concerns also support application of the rule of constitutional avoidance, because reading the illicit trafficking aggravated felony provision to apply to low-level possession offenses may raise problems under the void-for-vagueness due process doctrine. In light of the disparity between direct and collateral consequences, a non-citizen may lack sufficiently definite warning that a low-level simple possession offense could result in extreme immigration consequences. *See infra* Section II.

The illicit trafficking aggravated felony provision moreover should be construed so as to avoid problems of non-uniformity in immigration law. Congress is presumed to legislate with uniformity in mind. Immigration law uniformity is also grounded in the "uniform Rule of Naturalization" clause of the U.S. Constitution. Applying the illicit trafficking aggravated felony provision to state-law possession offenses that are misdemeanors under either federal or state law raises non-uniformity problems. Immigration consequences may turn on the happenstance of which state law a non-citizen was convicted under. The doctrine of constitutional avoidance counsels that the statute be construed to avoid such problems. *See infra* Section III.

The ABA therefore supports Petitioner's argument that a simple possession offense, even if a state-law felony, cannot

be an illicit trafficking aggravated felony if it would be a federal misdemeanor. However, a state's classification of a possession offense as a misdemeanor may not be disregarded simply because the offense might be prosecuted as a federal felony. Deeming either type of offense to be an illicit trafficking aggravated felony: (1) cannot be reconciled with the aggravated felony definition's text; (2) adversely affects the administration of criminal justice and the uniformity of immigration law; and (3) is contrary to the rules of lenity and constitutional avoidance. We submit that Congress never intended such a result. The illicit trafficking aggravated felony provision should be construed to include only offenses that involve trafficking and that are not misdemeanors under either federal or state law.[5]

ARGUMENT

I. THE STATUTORY TEXT, STRUCTURE, AND HISTORY DICTATE A NARROW READING OF THE ILLICIT TRAFFICKING AGGRAVATED FELONY PROVISION LIMITED TO FELONIES THAT INVOLVE TRAFFICKING.

The INA provides that "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) . . .)" constitutes an aggravated felony. 8 U.S.C. § 1101(a)(43)(B). Section 924(c), Title 18, in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" and two other federal criminal statutes. 18 U.S.C. § 924(c). The INA defines neither "felony" nor "trafficking" as those terms relate to the "illicit trafficking" "aggravated felony" provision. The Board of Immigration Appeals (BIA) and federal courts have failed to develop a consistent and coherent view of how this provision applies to state simple possession offenses.

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[5] Because all trafficking is a felony under federal law, state-law felony trafficking offenses are necessarily federal felonies. *See* 21 U.S.C. § 841.

Initially, the BIA held that by including offenses covered under the federal criminal code's definition of "drug trafficking crime," the INA includes a state possession offense analogous to a federal felony, even if it is not a state-law felony. *See In re K-V-D*, 22 I. & N. Dec. 1163 (B.I.A. 1999); *In re L-G*, 21 I. & N. Dec. 89 (B.I.A. 1995); *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).[6] This is the "hypothetical federal felony" approach. The BIA then changed course, holding that it would follow the relevant circuit's rule or, if there was no circuit authority, the majority rule. The BIA viewed the majority rule as being that the state designation controls: if a drug offense is a state-law felony it is an aggravated felony, regardless of whether it involves trafficking. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002); *In re Santos-Lopez*, 23 I. & N. Dec. 419 (B.I.A. 2002).

Some federal appellate decisions follow the hypothetical federal felony approach. *See, e.g., Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002). Others apply the state law designation. *See, e.g., United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996). And one appeals court has taken an either/or approach, holding that an offense is an aggravated felony if it would be a felony under either state or federal law. *See United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006).

Thus, depending on the jurisdiction, a non-citizen convicted of simple possession may be deemed to have committed an aggravated felony on the ground that (a) the offense is analogous to a federal drug felony; (b) the offense

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[6] The illicit trafficking aggravated felony provision was enacted in 1990. *See* Immigration Act of 1990 § 501, Pub. L. No. 101-649, 104 Stat. 4978, 5048, as corrected by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(1), Pub. L. No. 102-232, 105 Stat. 1733, 1751.

is classified as a state-law felony; or (c) either one of these circumstances exists.

Yet a coherent approach faithful to the statutory text and applicable to a range of factual contexts is possible. That textually faithful approach encompasses but goes beyond the hypothetical federal felony approach. It requires including as illicit trafficking aggravated felonies only those offenses that actually involve trafficking and that are not misdemeanors under either federal or state law. As discussed in Section I, the statutory text, structure, and legislative history dictate this reading. And as discussed in Sections II and III, the problems caused by a broader reading for the administration of criminal justice and for uniformity in the immigration laws further support the proposed statutory construction. Indeed, neither the rule of lenity nor the principle of constitutional avoidance permit reading the illicit trafficking aggravated felony provision to include low-level possession-only crimes.

A. Simple Possession, Whether a Felony Under State Law or a Hypothetical Felony Under Federal Law, Does Not Constitute "Illicit Trafficking."

The statutory language compels the conclusion that simple possession offenses are not aggravated felonies because "illicit trafficking" does not include mere possession of a controlled substance. In *Leocal*, this Court, construing another aggravated felony provision, unanimously reaffirmed that statutory terms should be given their "ordinary or natural meaning." 543 U.S. at 9 (internal quotation marks and citation omitted).[7]

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[7] Thus, driving under the influence of alcohol and causing serious bodily injury is not a "crime of violence" aggravated felony, 8 U.S.C. § 1101(a)(43)(F), because "[t]he ordinary meaning of this term [crime of violence] . . . cannot be said naturally to include DUI offenses," *Leocal*, 543 U.S. at 11. This analysis reflects the long-established principle that the inquiry into statutory meaning necessarily begins with the plain language. *See, e.g., Bailey v. United States*, 516 U.S. 137, 144 (1995).

Petitioner correctly explains that the natural reading of the statute is that a simple possession offense that is a state-law felony but a federal-law misdemeanor is not an illicit trafficking aggravated felony. *See* Lopez Br. I.A. *Leocal*, however, requires a further conclusion: because simple possession does not constitute trafficking, no simple possession offense, including one hypothetically punishable as a federal felony, constitutes an illicit trafficking aggravated felony.

The argument made for deeming state-law felony possession offenses to be aggravated felonies is that the INA refers to "drug trafficking (as defined in Section 924(c) . . .)"; Section 924(c) refers to "any felony punishable under the Controlled Substances Act"; and, allegedly, "any felony" includes any state-law felony. *See Lopez v. Gonzalez*, 417 F.3d 934 (8th Cir. 2005). The argument made for considering second or subsequent state-law misdemeanors is that, under federal criminal law, a second possession offense under certain circumstances may be prosecuted as a felony. *See* 21 U.S.C. § 844; *see also Sanchez-Villalobos*, 412 F.3d at 577. This is said to render such a misdemeanor offense a Section 924(c) "drug trafficking crime," and therefore an illicit trafficking aggravated felony. *Id.*

But the subcategory of Section 924(c) "drug trafficking crime[s]" "includ[ed]" in the principal category of "illicit trafficking" "aggravated felonies" may not swallow the principal "illicit trafficking" category. *See Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' . . . connotes simply an illustrative application of the general principle."). And the "ordinary or natural" meaning of "illicit trafficking" requires more than mere possession. *See* Compact Oxford English Dictionary 2092 (2d ed. 1999) (defining "traffic" as "[t]he buying or selling or exchange of goods for profit; bargaining; trade"); *cf. Salinas v. United States*, 126 S. Ct. 1675, 1675 (2006)

(per curiam) (holding that simple possession does not constitute a "controlled substance offense" under the Sentencing Guidelines because the relevant Guideline pertains to "possession . . . with intent to manufacture, import, export, distribute, or dispense" (internal quotation marks and citation omitted)).

Thus, the natural reading of the aggravated felony provision is that it creates a single "illicit trafficking" category that "includ[es]" as a subset those felony violations of three designated federal statutes that themselves include a "trafficking element." In other words, even if all offenses punishable as felonies under the three statutes enumerated in Section 924(c) constitute Section 924(c) "drug trafficking crimes," it does not follow that all "drug trafficking crimes," including misdemeanor crimes hypothetically punishable as federal felonies, constitute "illicit trafficking" under 8 U.S.C. § 1101(a)(43)(B). Therefore, simple possession offenses, irrespective of their misdemeanor or felony classification, do not constitute illicit trafficking aggravated felonies.

B. To be an "Aggravated Felony," a State Offense Must Be a Felony Under State Law.

The ABA agrees with Petitioner that a state felony possession offense that would be a misdemeanor under federal law is not an "illicit trafficking" "aggravated felony." This conclusion should not be taken, however, to suggest that because a second or subsequent state-law misdemeanor possession offense might be prosecuted as a felony under federal law, the offense constitutes an aggravated felony.[8]

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[8] Petitioner does not address this issue because his offense is a state felony. The Court need not reach this question here. However, in other cases, it has been argued or courts have found that state misdemeanor drug possession offenses are aggravated felonies under the hypothetical federal felony approach. *See, e.g., Sanchez-Villalobos*, 412 F.3d 572. This is not a proper application of the hypothetical federal felony

The natural meaning of the term "aggravated" modifying "felony" is that "aggravated felony" includes only particularly serious felonies. *See* Compact Oxford English Dictionary 28 (defining "aggravated" as "Increased, magnified; Increased in gravity or seriousness: made worse or more grievous; intensified in evil character"); *see also Leocal*, 543 U.S. at 9.[9] The statutory structure and history further show that "aggravated felonies" do not include non-felony offenses.

Other INA amendments enacted simultaneously with the "aggravated felony" provision reflect that Congress intended that this provision include only felonies.[10] For example, Congress revised the immigration detention provisions to require detention of "any alien convicted of an aggravated felony," and directed that "the Attorney General shall not

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approach, *see infra* p.29; *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), and is incorrect for the other reasons set forth in this brief.

[9] As one circuit judge observed:

> Common sense and standard English grammar dictate that when an adjective – such as "aggravated" – modifies a noun – such as "felony" – the combination of the terms delineates a subset of the noun. One would never suggest, for example, that by adding the adjective "blue" to the noun "car," one could be attempting to define items that are not, in the first instance, cars. In other words, based on the plain meaning of the terms "aggravated" and "felony," we should presume that the specifics that follow in the definition of "aggravated felony" under INA § 101(a)(43) serve to elucidate what makes these particular felonies "aggravated"; we certainly should not presume that those specifics would include offenses that are not felonies at all.

United States v. Pacheco, 225 F.3d 148, 157 (2d Cir. 2000) (Straub, J, dissenting).

[10] *See* Anti-Drug Abuse Act of 1988 ("ADAA"), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469; *see generally Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal quotation marks and citation omitted)).

release such felon from custody."[11] ADAA § 7343(a)(4), 102 Stat. at 4470. Congress also amended the criminal provision for illegal reentry after deportation to provide for different sentence enhancements depending on whether the prior deportation was subsequent to an aggravated felony conviction or, instead, to conviction for "a felony (other than an aggravated felony)." *Id.* § 7345(a)(2), 102 Stat. at 4471.[12] Congress later added an enhancement if the prior deportation followed a conviction for "three or more misdemeanors." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 2023. Thus, Congress distinguished between misdemeanors and aggravated felonies within the same statutory provision.[13] The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which amended the "aggravated felony" definition, further supports the distinction. *See* Pub. L. No. 104-208, Div. C, § 321, 110

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[11] *See also id.* § 7347(a), 102 Stat. at 4471-72 ("With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General . . . the Attorney General shall, to the maximum extent practicable, detain any such felon at a facility at which other such aliens are detained.").

[12] In 1990 and 1991 amendments, Congress also clarified that state drug offenses may be deemed aggravated felonies and barred waiver of exclusion for aggravated felons, *see* Immigration Act of 1990, Pub. L. No. 101-649, §§ 501(a)(3), 511(a), 104 Stat. 4978, 5048, 5052, if the individual had served "for such felony or felonies" a five-year or more term of imprisonment, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, 1751.

[13] Congress saw no need to add a parenthetical "(other than an aggravated felony)" to the "three or more misdemeanor" provision, plainly contemplating overlap between the terms "felony" and "aggravated felony" but not between "misdemeanor" and "aggravated felony." *See Leocal*, 543 U.S. at 12 (holding that the fact that the statute separately listed and distinguished between "crime of violence" and "DUI" for purposes other than the aggravated felony definition, "reinforc[ed]" the conclusion that a DUI is not a crime of violence aggravated felony).

Stat. 3009-546, 3009-627 to -628. Proponents of the IIRIRA amendments referred to the crimes and individuals they wished included as "felonious acts," "convicted felons," and "serious felonies," in addition to "aggravated felonies" and "aggravated felons." 142 Cong. Rec. S4592-01, S4598-S4600 (May 2, 1996).[14]

Thus, the statutory structure and legislative history reinforce that Congress knew how to, and did, distinguish between felons and misdemeanants. It intended that the aggravated felony provision apply only to felony offenses.

II. SUBJECTING NON-CITIZENS TO MANDATORY DEPORTATION FOR LOW-LEVEL SIMPLE POSSESSION OFFENSES ADVERSELY AFFECTS THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.

Any drug offense, including simple possession (other than a single offense of possession for personal use of 30 grams or less of marijuana), renders a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(B)(i). In many cases the United States appropriately removes non-citizens for committing crimes, including drug offenses. But Petitioner and other non-citizens convicted of low-level possession offenses have not merely been deemed "deportable" (meaning there would still be the possibility of discretionary relief). Rather, they are subject to mandatory deportation and other extreme immigration consequences as "aggravated felons."

Imposing such harsh immigration consequences for low-level offenses has unanticipated adverse consequences for the

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[14] Also, in a colloquy about IIRIRA's restoration of eligibility for deportation relief to "aliens who have not committed aggravated felonies," Senator Hatch explained that this was in response to earlier restrictions barring relief "for virtually any alien who had been convicted of any crime, including some misdemeanors." 142 Cong. Rec. S12294-01, S12295 (Oct. 3, 1996).

justice system. Not only does it result in injustices for individual defendants, but it negatively affects the role of prosecutors, defense counsel, and judges. The statutory provision at issue should be construed, under the rules of lenity and constitutional avoidance, to maintain and promote the fairness and integrity of the justice system.

A. The Severity of the Collateral Consequences of Aggravated Felony Convictions is Disproportionate to the Criminal Justice System's Treatment of Low-Level Possession Offenses.

The immigration consequences of an aggravated felony conviction are myriad and severe. Such a conviction bars discretionary relief from deportation, known as cancellation of removal.[15] *See* 8 U.S.C. § 1229b(a). A non-citizen convicted of such an offense may not request that an immigration judge consider the offense's actual severity, the individual's equities, and the interests of the United States.[16] Aggravated felony convictions also bar asylum, *id.* § 1158(b)(2)(B), and may preclude withholding of removal, another type of deportation relief, *id.* § 1231(b)(3)(B).[17]

Commission of any crime is a serious matter, but not all crimes are of equal gravity. ABA policy recognizes that convictions for misdemeanors under either federal or state law should not result in mandatory, extreme immigration

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[15] Non-citizens have long been deportable for some crimes, but discretionary relief existed. *See St. Cyr*, 533 U.S. at 294-96. IIRIRA eliminated such relief for "aggravated felons."

[16] In a cancellation of removal hearing, the judge may waive deportation based on factors such as the non-citizen's family ties in the U.S., residence of long duration in this country, hardship to the family, service in the U.S. Armed Forces, history of steady employment, existence of property or business ties, proof of rehabilitation, and other equities such as value and service to the community. *See, e.g., In re C-V-T*, 22 I. & N. Dec. 7 (B.I.A. 1998).

[17] A post-1990 aggravated felony also permanently bars naturalization. *See id.* §§ 1101(f)(8), 1427(a)(3).

consequences. *See* ABA Report 300 at 1. ABA policies also recognize that collateral consequences should correspond to the seriousness of the conduct involved. *See* ABA Criminal Justice Standards 19-1.2 and 19-2.2. Broadly construing the "illicit trafficking" "aggravated felony" provision to include offenses that do not involve trafficking, and that would be misdemeanors under either federal or state law, creates stark disproportionality between the offense and its collateral consequences.[18] As Petitioner's case illustrates, under the broad reading of the illicit trafficking aggravated felony provision currently being applied in immigration proceedings, a single simple possession offense triggers mandatory deportation. It is plainly legitimate for a state, such as South Dakota, to treat simple possession as a felony to effectuate local criminal justice policies. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985). But states do not legislate criminal law with collateral immigration consequences in mind. Even if the state classifies an offense as a felony, traditional criminal justice goals are typically served by punishing the offender sufficiently to achieve retribution and deterrence, while at the same time permitting rehabilitation and reassimilation into society. Permanently and automatically banishing an individual from the country may go well beyond those goals.

The disproportionality that results from imposing mandatory deportation is even more apparent when

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[18] Indeed, the term "conviction" as used in the INA includes dispositions for which the sentence was suspended, or for which the penalty consisted of participation in rehabilitative programs, community service, or fines. 8 U.S.C. § 1101(a)(48). Withheld adjudications and deferred prosecutions are also included. *In re Punu*, 22 I. & N. Dec. 224 (B.I.A. 1998). A disposition that is not a "conviction" under state criminal law may still be a "conviction" for immigration purposes. *In re Salazar-Regino*, 23 I. & N. Dec. 223, 231 (B.I.A. 2002) (en banc).

misdemeanor offenses are considered.[19] Misdemeanor possession charges tend to result in probation, time served, or lesser penalties, rather than incarceration.[20]

That some states have chosen to reduce sentences or otherwise ameliorate criminal justice consequences for drug possession offenses further illustrates the disparity between the criminal justice treatment of low-level possession crimes, and the severity of mandatory deportation as a collateral consequence.[21] Arizona, for example, mandates probation and treatment for certain first and second-time drug

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[19] Misdemeanor possession offenses exist in many jurisdictions. *See, e.g.*, Alaska Stat. § 11.71.050 (various controlled substances, including marijuana and barbituates); Del. Code 16 §§ 4753-4754 (any narcotic); Haw. Rev. Stat. § 712-1246.5 ("any harmful drug"); Mass. Gen. Laws 94C § 34 (any controlled substance except second heroin offense); Mich. Comp. Laws § 333.7403 (marijuana and various hallucinogens); N.Y. Penal Law § 220.03 (any controlled substance); Tenn. Crim. Code § 39-17-418 (cocaine); Wyo. Stat. § 35-7-1031(c) (any controlled substance).

[20] *See, e.g.*, Stephanie Morin, New York State Defenders Assoc., Analysis of New York State Division of Criminal Justice Services Misdemeanor Drug Offense Statistics for the Years 1995 Through 2004 (Oct. 15, 2005), http://www.nysda.org/idp/docs/05_Analysis.pdf; New York State Dispositions – 1995 through 2004, http://www.nysda.org/idp/docs/NYS.Conviction.Sent.and.Len.pdf (in over 60% of the 258,655 New York misdemeanor possession convictions from 1995-2004, the defendant received time served, probation, conditional discharge, or a fine); Mass. Dep't of Corr., New Court Commitments to Massachusetts County Correctional Facilities During 2004, at 16 tbl. 15 (Nov. 2005), http://www.mass.gov/Eeops/docs/doc/research_reports/2004cty.pdf (showing that persons convicted of simple possession represent a small fraction of those incarcerated in Massachusetts for drug offenses).

[21] *See* Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, at 1 (Mar. 2004), http://www.vera.org/publication_pdf/226_431.pdf (in 2003 "[t]hirteen states made significant changes, ranging from the repeal or reduction of mandatory minimum sentences for drug-related offenses to the expansion of treatment-centered alternatives to incarceration"); *see also id.* at 1-2, 14 (noting that some states have concluded that incarceration-focused approaches to possession crimes are unsuccessful).

possession offenders.[22] California passed a similar law,[23] and Texas has decided to punish low-level, first-time possession offenses classified as felonies with community supervision and substance abuse treatment, not incarceration.[24]

Finally, defendants charged with low-level possession offenses may receive minimal procedural protections. This reflects the high volume of such offenses and the expectation that minimal criminal law consequences will result. In New York State, for example, there are tens of thousands of misdemeanor possession arrests annually. New York State Div. of Crim. Just. Servs., Adult Arrests: N.Y. State by County and Region 1994, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year1994.htm. New York City criminal court judges handle thousands of cases per year. Daniel Wise, *Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation*, N.Y. L.J., May 22, 2000, at 1. Most of these misdemeanors are of necessity processed extremely quickly and without substantial procedural protections. To varying degrees, this is true throughout the country. Providing relatively few procedural protections in a criminal case with low stakes may be appropriate; where mandatory deportation results, however,

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[22] Ariz. Rev. Stat. § 13-901.01; *see also State v. Gomez*, 127 P.3d 873, 877 (Ariz. 2006) (describing the intent behind the Arizona statute as being a desire to more effectively treat drug addicts and to save the state millions of dollars in incarceration costs).

[23] *See* Cal. Penal Code § 1210.1 (requiring probation for most first or second nonviolent drug possession convictions); *People v. Williams*, 131 Cal. Rptr. 2d 546, 549-50 (Cal. Ct. App. 2003).

[24] *See* Tex. Crim. P. Code art. 42.12 § 15(a)(1) (as amended by Texas H.B. 2668, Chapter 1122 (2003)); Tex. Health & Safety Code §§ 481.115(b), 481.1151(b)(1), 481.116(b), 481.121(b)(3), 481.129(g)(1); *see also Holcomb v. State*, 146 S.W.3d 723, 733 (Tex. App. 2004) ("The 2003 [Texas sentencing] amendment . . . require[s] mandatory clemency in the form of probation rather than leaving probation to the discretion of the trial court.").

the stakes are considerably higher than such treatment warrants.

B. Disproportionality Between Collateral and Direct Consequences Compromises the Integrity of the Criminal Justice System.

Where collateral immigration consequences greatly outweigh direct criminal consequences of a conviction, injustices for the defendant are not the only result. This disproportionality also adversely affects the administration of the criminal justice system and its key actors – prosecutors, defense attorneys, and judges. Robert Johnson, a former President of the National District Attorneys Association and a current officer of the ABA's Criminal Justice Section task force, has described these problems:

> Increasingly we see situations in which the collateral consequences of a criminal conviction exceed the consequences that are imposed by a judge upon sentencing. . . . . A foreigner legally in this country for many years, who may be married to a U.S. citizen and/or parent of U.S. citizens, can be deported for relatively minor offenses. . . .
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> [A]s prosecutors, we see the effects of these collateral consequences. When the consequences are significant and out of anyone's control, victims of criminal conduct are less likely to cooperate. Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge and is disproportionate to the offense and offender. . . . [M]any judges change their rulings, sentencing felonies as misdemeanors and expunging records to avoid what they believe to be an unjust result. A judge in my jurisdiction once allowed a felon to withdraw his plea of guilty after he served his prison sentence to avoid a deportation. . . .

> [T]he collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences. As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.[25]

Disproportionality between collateral and direct consequences adversely affects the prosecutorial function. "The duty of the prosecutor is to seek justice, not merely to convict." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-1.2(c) (3d ed. 1993). In order to carry out that duty, prosecutors enjoy broad discretion to decide whether and what charges to bring against an individual. *See id.* Commentary to ABA Criminal Justice Standard 3-1.2(c) at 5. Taking into account collateral consequences goes hand in hand with these obligations.[26]

Where collateral consequences are excessive in relation to the offense and cannot be averted upon conviction, however, prosecutors may find themselves sacrificing traditional criminal justice principles. Pursuing a conviction may serve the goals of punishment or deterrence but cannot be reconciled with the duty to seek justice. This can lead

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[25] Message from the President Robert M.A. Johnson, Nat. Dist. Attys. Ass'n, The Prosecutor, May/June 2001, http://www.ndaa-apri.org/ndaa/about/president_message_may_ june_2001.html ("Message from the President, NDAA").

[26] *See id.* Standard 3-3.9(b)(iii) (in deciding whether to bring charges a prosecutor may consider disproportion of the authorized punishment to the particular offense or offender); NDAA, National Prosecution Standards 42.3 (2d ed. 1991) (prosecutors may consider "[u]ndue hardship caused to the accused" in deciding whether to bring charges).

prosecutors to change a charge's wording or which offense is charged, or even to decline to bring low-level charges.[27]

In the process, state criminal law enforcement may be distorted. The non-citizen may suffer injustice if harsh immigration consequences result from a low-level offense conviction. Yet averting such consequences can require extraordinary steps that impede the fulfillment of criminal justice goals. A prosecutor might charge a non-citizen with a lesser crime to avoid excessive collateral immigration consequences. Ironically, a U.S. citizen who engages in the same conduct may therefore be charged more severely and receive harsher treatment than a non-citizen. *See* Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. at 1424-25 & n.37.

Disproportionate collateral consequences also adversely affect the prosecutorial function because those consequences can dramatically alter defendants' incentives. The incentive to go to trial increases greatly where mandatory deportation will follow a plea, *see St. Cyr*, 533 U.S. at 323, even where criminal justice considerations (such as the likelihood of conviction or the prospect of an acceptable criminal sanction upon a plea) dictate otherwise. Yet prosecutors, like defense counsel, face resource constraints. Plea bargaining obviates the need for trial and concomitant expense, relieves uncertainty, and gives the parties some control over the resulting disposition. Resolving cases by plea in appropriate circumstances is therefore, as a practical matter, critical to the administration of criminal justice and to prosecutors' ability to manage their resources. Relatively minor offenses such as simple possession crimes are prime candidates for

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[27] *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411, 1454-55 (2005) (discussing examples in which prosecutors went to great lengths to circumvent defendant's deportation); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 Ark. L. Rev. 269, 303-06 (1997)).

resolution by plea. Prosecutors face significantly increased resource pressures where defendants go to trial because a plea would trigger mandatory deportation.

The disparity between collateral and criminal consequences also affects defense counsel's role. Where mandatory deportation will result from a conviction, a defense attorney will often pursue any and all strategies to avoid that result. As one widely used criminal defense practice guide explains: "[T]he permanent immigration consequences greatly outweigh the criminal consequences in the vast majority of all criminal cases. . . . [M]ost defendants[] who . . . understand the exact meaning of the adverse immigration consequences of a proposed plea bargain, will be willing to sacrifice traditional criminal defense goals in order to protect their immigration status." Norton Tooby & Katherine A. Brady, *Criminal Defense of Immigrants* § 1.4 at 20 (3d ed. 2003). For example, assuming the non-citizen defendant considers avoiding mandatory deportation critical (almost invariably so), defense counsel is far more likely than in the ordinary case to advise that client to go to trial. *See id.* The more broadly the aggravated felony provision is construed, the more counsel's decisions are affected.

The defense function is also affected in other ways. Counsel should accurately advise clients of collateral consequences.[28] This is even more critical where the stakes are as high as mandatory deportation. *See St. Cyr*, 533 U.S. at 322 n.48; *see also, e.g., People v. Correa*, 485 N.E.2d 307 (Ill. 1985). Indeed, inaccurate advice may be a basis for a defendant to withdraw or attack a plea, including by claiming

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[28] *See* ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant sufficiently in advance of the entry of any pleas, as to the possible collateral consequences[.]").

ineffective counsel.[29] Yet it is extraordinarily difficult to advise clients when the immigration statute is read in an overly broad and non-coherent manner. Deeming low-level possession offenses to be "illicit trafficking" "aggravated felonies" is such a reading. These offenses involve no trafficking and are misdemeanors under either federal or state law. So construed, the statute can be a labyrinth of traps for the unwary, even for counsel armed with manuals such as the ABA's *The Criminal Lawyer's Guide to Immigration Law – Questions and Answers*. That most defense counsel are under-funded public defenders or legal service providers with high caseloads renders the problem more acute.

Finally, where the offense is classified as a misdemeanor under state law, there is a realistic possibility that a defendant could be unrepresented. Many states permit conviction for a misdemeanor without counsel if there will be no incarceration.[30] The critical defense role of accurately

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[29] *See Rollins v. State*, 277 Ga. 488, 492 (Ga. 2004) (holding that defendant who was erroneously advised that drug possession plea under state's First Offender Act would not result in deportation was entitled to withdraw plea); *In re Resendiz*, 25 Cal. 4th 230, 248 (2001) (holding that misadvice regarding immigration consequences may constitute ineffective assistance); *Correa*, 108 Ill. 2d at 553 ("[E]rroneous and misleading advice on the crucial consequence of deportation [meant] the defendant's pleas of guilty were not intelligently and knowingly made and therefore were not voluntary[.]"). *See also* ABA Criminal Justice Standard 14-2.1 (providing that a court should permit withdrawal of a plea if involuntary).

[30] States in which misdemeanor possession convictions may be uncounseled include Florida, *see* Fla. Stat. § 893.13(6)(a) (first degree misdemeanor marijuana possession offense); Fla. R. Crim. P. 3.111(b)(1) (no right to counsel if judge certifies there will be no incarceration); Fla. Stat. § 27.512 (court may not appoint public defender if has issued no-incarceration order), Massachusetts, *see* Mass. Gen. Laws ch. 94C § 34; *id.* ch. 274 § 1 (first and second marijuana possession offenses are misdemeanors); *id.* ch. 211D § 2A (no counsel appointed of the judge states on the record that a misdemeanor defendant will not be sentenced to incarceration); and New Hampshire, *see* N.H. Rev. Stat. § 318-B:26

advising a defendant of immigration consequences is necessarily undermined where there is no counsel. *See* ABA Criminal Justice Standard 14-3.2(f). Yet second or subsequent misdemeanors have been deemed aggravated felonies. *See, e.g., Sanchez-Villalobos*, 412 F.3d 572.

Nor is the role of the judiciary unaffected. Judges recognize that extreme immigration consequences may not be warranted in every case. ABA Standards support this principal.[31] In order to render justice and avoid condemning non-citizen defendants to mandatory deportation, judges may exercise leniency or otherwise take steps not ordinarily taken. *See* Message from the President, NDAA.

Judges too are burdened by the incentives disproportionate collateral consequences create for non-citizen defendants. In criminal courts around the country, defendants charged with minor offenses may be arraigned, plead guilty, and be sentenced all on the same day. Judges may not have the luxury of spending more than a few minutes on each case. State criminal justice systems have come to rely heavily on plea bargaining to diminish the administrative burden of dealing with large numbers of cases, including low-level drug crimes. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."). But defendants

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(class A misdemeanor marijuana possession offense); *id.* § 625:9 (VII) (a prosecutor may change a nonviolent class A misdemeanor charge to a class B misdemeanor charge) (amended in non-relevant part by 2006 N.H. Laws Ch. 64 (H.B. 1636)); *id.* § 604-A:2 (no right to appointed counsel for class B misdemeanors).

[31] *See* ABA Criminal Justice Standards 19-1.2 & 19-2.2; *see also id.* Standard 19-2.4 (courts should take into account collateral sanctions in determining a sentence, and should inform the defendant of those sanctions); *id.* Standard 19-2.5 (courts should be authorized to grant relief from collateral sanctions).

facing mandatory deportation are far more likely not only to go to trial but also to litigate post-conviction, such as by seeking to withdraw pleas or to appeal or collaterally attack their convictions. Judges, as well as prosecutors and defense counsel, therefore must expend valuable resources that might be better dedicated to matters other than intensive litigation over low-level charges.

In sum, the disproportionality between the collateral consequences of aggravated felony convictions and the direct consequences of low-level possession crimes produces myriad adverse affects on the fair and orderly administration of criminal justice.

C. The Rules of Lenity and Constitutional Avoidance, and the Fair and Regular Administration of Criminal Justice, Require a Narrow Reading of the Illicit Trafficking Aggravated Felony Provision.

Deeming low-level drug possession offenses to be illicit trafficking aggravated felonies creates a dramatic disparity between collateral and direct criminal consequences. Should the Court find the statute ambiguous, the rules of lenity and constitutional avoidance apply. Each canon compels the conclusion that the illicit trafficking aggravated felony provision only applies to felony offenses involving trafficking.

The well-settled rule of lenity requires that "any lingering ambiguities in deportation statutes [be construed] in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also United States v. Bass*, 404 U.S. 336, 348-49 (1971) (rule of lenity applies to criminal law provisions). A key principle animating this rule is that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bass*, 404 U.S. at 348; *see also St. Cyr*, 533 U.S.

at 321 (explaining that considerations of fair notice, reasonable reliance, and settled expectations properly play a role in statutory interpretation). Fair warning is sorely lacking when simple possession crimes trigger mandatory deportation for "illicit trafficking." Similarly, any ambiguity as to the meaning of "aggravated felony" must be resolved in favor of a narrow reading that does not include misdemeanors. Individuals charged with misdemeanor possession offenses lack fair notice that they will be deemed "aggravated felons." Indeed, the criminal justice system commonly treats these offenses in a summary fashion, with minimal procedural protections and speedy disposition by plea bargain in almost all cases. These defendants can reasonably expect relatively minor direct criminal consequences. For mandatory deportation to follow is quite another matter.[32]

The rule of constitutional avoidance also counsels that illicit trafficking aggravated felonies do not include low-level possession crimes. Assuming there were "two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail[.]" *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). This principle "rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381.[33] Deeming low-level simple possession to constitute an illicit trafficking aggravated felony threatens to run afoul of the void for

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[32] The rule of lenity compels reading the statute to exclude low-level possession crimes for additional reasons as well. *See* Lopez Br. at III.B & C; Toledo-Flores Br. at E.

[33] *See also* Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-61 (1997) (providing examples of cases where the Court construed a statute narrowly to avoid a constitutional question ultimately resolved in favor of the broader reading).

vagueness doctrine, itself based in the Due Process Clause. *See Jordan v. De George*, 341 U.S. 223, 230 (1951). That doctrine, applicable in the immigration context "in view of the grave nature of deportation," requires that a statute "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 231-32. Such warning is lacking in cases involving low-level possession offenses, including Petitioner's as well as second or subsequent misdemeanors.[34] The "illicit trafficking" "aggravated felony" statutory language does not convey that such offenses would be included. The manner in which the criminal justice system deals with such offenses further demonstrates this point. These offenses may be addressed in a fairly summary fashion; the direct criminal consequences are relatively low stakes.[35] A non-citizen in such circumstances lacks sufficient warning as to deportation consequences.

III. THE ILLICIT TRAFFICKING AGGRAVATED FELONY PROVISION SHOULD BE CONSTRUED TO AVOID NON-UNIFORMITY PROBLEMS.

Congress is generally presumed to legislate with uniformity in mind. *See Jerome v. United States*, 318 U.S. 101, 104 (1943) ("[I]n the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law."). Moreover, immigration law is quintessentially a matter of federal policy and should be uniform.

Uniformity in immigration law also has constitutional underpinnings. The one provision in the U.S. Constitution expressly referring to the federal immigration power

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[34] The constitutional avoidance principle applies "whether or not th[e] constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 724.

[35] In some instances, convictions could even be obtained without counsel.

provides: Congress shall "establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8. Congress's power over naturalization must "necessarily be exclusive [to the federal government]; because if each State had power to prescribe a Distinct Rule, there could be no Uniform Rule." The Federalist No. 32 at 199 (Alexander Hamilton) (Clinton Rossiter ed. 1961).[36] This Court has not construed the Uniform Rule provision, but has recognized the principle of uniformity in immigration law. *See Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875) ("The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco," requiring "a uniform system or plan[.]"); *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941) ("[T]he treatment of aliens, in whatever state they may be located, [is] a matter of national moment.").[37]

ABA policy further counsels uniformity. Limiting collateral sanctions "to those that are specifically warranted by the conduct constituting a particular offense" necessarily means that immigration consequences should not vary based on the arbitrary fact of geography. ABA Criminal Justice Standard 19-1.2. ABA policy that the aggravated felony provision should not be read to include misdemeanors under

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[36] The Constitution refers to naturalization, but "the Federal Government['s]" "broad constitutional powers" include "determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). Also, aggravated felonies implicate naturalization. *See supra* p.14 note 17.

[37] *See also Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Congress' power is to 'establish a uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.").

either state or federal law also recognizes that including such crimes raises non-uniformity problems. *See infra* pp.29-30.[38]

Thus, the illicit trafficking aggravated felony provision should be construed so as to avoid non-uniformity problems arising from attaching immigration consequences to state-law convictions. Constitutional concerns underscore that Congress did not intend to foster non-uniformity through the aggravated felony provision. *See Clark*, 543 U.S. at 380-81.

As presently applied, the illicit trafficking aggravated felony provision triggers varying immigration consequences depending on the geographical happenstance of where the non-citizen was convicted. On the one hand, as Petitioner's case illustrates, simple possession may be deemed an aggravated felony if the offense is a felony under state law. But while some states have made a local policy choice to classify possession crimes as felonies, others have chosen differently. Basing the aggravated felony designation on the state's felony classification has "the paradoxical result of allowing states, in effect, to impose banishment from the United States as a sanction for a violation of state law. For then if a state made the possession of one marijuana cigarette a felony, which it is perfectly entitled to do, it would be in effect annexing banishment from the United States to the criminal sanction." *Gonzales-Gomez v. Achim*, 441 F.3d 532, 535 (7th Cir. 2006).[39]

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[38] Uniformity is also a matter of basic fairness. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

[39] *See also Gerbier*, 280 F.3d at 312 (noting the "real possibility" of "disparate results" that contravene the uniformity principle if the fact that a state classifies a drug offense as a felony suffices to make it an "aggravated felony"). Nor is this the first time the aggravated felony provision has been applied, at least initially, so as to compromise uniformity. *See, e.g., Solorzano-Patlan v. INS*, 207 F.3d 869, 874 (7th Cir. 2000) (rejecting the former INS's argument that a non-citizen's

On the other hand, the approach adopted in some circuits of deeming second or subsequent state-law misdemeanors to be aggravated felonies also raises non-uniformity problems. Such offenses could be prosecuted as felonies under federal law. *See* 21 U.S.C. § 844. However, federal law imposes strict requirements on the government for doing so. The United States Attorney must file an information alleging, and then must subsequently prove, that the defendant had a valid final conviction for a prior drug offense. *See id.*; *Steele*, 236 F.3d at 137-38. The defendant may challenge the prior conviction as unlawfully obtained. *See* 21 U.S.C. § 851. States vary as to whether they have such procedural schemes for repeat misdemeanor offenses and whether those procedures are utilized.[40] Thus, depending on the state at issue, a non-citizen with a second misdemeanor may or may not have received those additional protections.[41]

Non-uniformity also results from deeming second misdemeanor possession convictions to be aggravated felonies for another reason. As described above, the procedural protections afforded during the criminal justice process can vary depending on whether the charge is for a felony or a misdemeanor. *See supra* pp.16-17. And while states typically classify all offenses actually involving trafficking as felonies, they vary as to how they classify and

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conviction was a "burglary offense" aggravated felony simply because he was convicted under an Illinois statute entitled "burglary," where other states would not apply that label and the Illinois offense did not correspond to the generic "burglary" definition).

[40] Massachusetts, for example, has an enhanced penalty provision for recidivists that imposes analogous requirements. *See* Mass. G.L. ch. 278, § 11A. But many states do not.

[41] Requiring that the state prosecution satisfied procedural requirements analogous to those existing under federal law is one approach to this problem, *see Steele*, 236 F.3d at 137-38, but does not ameliorate non-uniformity. This rule could only apply in states that have such procedural requirements, and only some states do.

treat simple possession offenses. In a state where the offense is a misdemeanor, mandatory deportation could result based on a conviction obtained with a lesser degree of due process than in other states. The variance in treatment could be dramatic in congested court systems where misdemeanor offenses may be resolved in a matter of minutes, or in states that may not always provide counsel for a misdemeanor.

The statute should be construed to avoid non-uniformity problems. *See Clark*, 543 U.S. at 380-81. Non-uniformity implicates the "uniform Rule" requirement.[42] Moreover, permitting the accident of geography to determine whether an offense is an aggravated felony leads to fair notice problems. A non-citizen cannot be expected to reasonably understand or be able to predict the collateral consequences of a low-level offense conviction in those circumstances. *See supra* pp.25-26. Adopting a narrower reading of the illicit trafficking aggravated felony provision avoids these constitutional doubts. The aggravated felony designation should apply only to state-law felonies and only where those felonies are not misdemeanors under federal law. Furthermore, the designation should apply only when trafficking is involved. In this manner, the non-uniformity introduced by sweeping individuals such as Petitioner, or second-time misdemeanants, into the "illicit trafficking" aggravated felony category would be avoided.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the Court should reverse the decision of the Court below.

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[42] *See generally* Iris E. Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of 'Aggravated Felony' Convictions*, 74 N.Y.U. L. Rev. 1696 (1999).

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In The
Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO R. GONZALES,
Attorney General of the United States,

Respondent.

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eighth And Fifth Circuits

BRIEF FOR AMICI CURIAE ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, CASA OF MARYLAND, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., CENTER FOR GENDER & REFUGEE STUDIES, COALITION OF IRISH IMMIGRATION CENTERS, CUBAN AMERICAN BAR ASSOCIATION, FAMILIES FOR FREEDOM, HEBREW IMMIGRANT AID SOCIETY, HISPANIC NATIONAL BAR ASSOCIATION, JUVENILE LAW CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS, LEGAL MOMENTUM, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL CENTER FOR YOUTH LAW, NATIONAL COUNCIL OF LA RAZA, NATIONAL NETWORK TO END VIOLENCE AGAINST IMMIGRANT WOMEN, NEW YORK IMMIGRATION COALITION, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., PUERTO RICAN BAR ASSOCIATION, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are organizations whose members, constituents, and clients face the real-world consequences of classifying non-citizens with simple possession offenses as drug traffickers under immigration law.[1] We speak on behalf of individuals who have lived and worked in this country from a young age, have U.S. citizen spouses and children, served this country in times of war, and face persecution abroad if deported. This brief presents actual cases of individuals whose rights will be affected by the Court's ruling, illustrating through examples the different consequences of classifying simple possession offenses as aggravated felonies.

Amici consist of the following organizations:

- Asian American Justice Center
- Asian American Legal Defense and Education Fund
- Asian Law Caucus
- Asian Pacific American Legal Center of Southern California
- CASA of Maryland
- Catholic Legal Immigration Network, Inc.
- Center for Gender & Refugee Studies
- Coalition of Irish Immigration Centers
- Cuban American Bar Association
- Families for Freedom
- Hebrew Immigrant Aid Society

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[1] Amici curiae state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of the Court.

- Hispanic National Bar Association
- Juvenile Law Center
- Lawyers' Committee for Civil Rights
- Legal Momentum
- Lutheran Immigration and Refugee Service
- Mexican American Legal Defense and Educational Fund
- National Center for Youth Law
- National Council of La Raza
- National Network to End Violence Against Immigrant Women
- New York Immigration Coalition
- Puerto Rican Legal Defense and Education Fund, Inc.
- Puerto Rican Bar Association
- U.S. Committee for Refugees and Immigrants

More detailed descriptions of amici are included in the appendix to this brief.

SUMMARY OF ARGUMENT

Our clients, constituents, and members are workers, employers, students, veterans, parents, and other valued members of American society. They have developed deep roots in our country, working, owning businesses, raising families, paying taxes, and serving in the military. Because of their convictions for drug possession, they are removable under the immigration laws. If incorrectly characterized as traffickers under the immigration laws, these individuals would additionally be labeled "aggravated felons" and subjected to mandatory deportation. As aggravated felons, they would be categorically barred from applying for discretionary, humanitarian relief from

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removal, and permanently denied the opportunity to become U.S. citizens.

Amici urge the Court to recognize the distinction Congress has drawn between simple possession offenses and drug trafficking offenses. The plain language and legislative history of the statutory provision at issue, 8 U.S.C. § 1101(a)(43), underscore the plain meaning distinction between trafficking and possession. Our clients, constituents, and members who have been found guilty of simple possession are not traffickers. Their convictions were not for sale or distribution, but for possession. In the period since their convictions, which in many cases occurred long ago, many have rehabilitated themselves and led peaceful and meaningful lives. They should have the opportunity to seek discretionary, humanitarian relief from removal.

If the Court finds that the statute is unclear in drawing a distinction between simple possession and trafficking, the rule of lenity requires the narrowest reading of the statute, in recognition of the penalties at stake in immigration and criminal cases. If treated as drug traffickers and aggravated felons, our clients, constituents, and members face the harshest of penalties: separation from their spouses and children, many of whom are U.S. citizens, and from the country they served as decorated soldiers.

Amici urge the Court to adopt a reading of the statute that distinguishes between possession and trafficking, and allows our clients, constituents, and members to apply for discretionary, humanitarian relief. The most severe penalties of the immigration laws – reserved for drug traffickers and other aggravated felons – should not be

automatically applied to individuals whose convictions are for simple possession offenses.

BACKGROUND

Those members of our community who are non-citizens with simple possession criminal convictions are already subject to removal under current immigration law. At issue in this case is whether they should be treated as drug traffickers, and thus be subject to the harsh additional penalties that accompany that characterization. Non-citizens with drug trafficking convictions are treated as aggravated felons, and are categorically barred from applying for virtually all forms of discretionary relief from removal and permanently prohibited from naturalized U.S. citizenship.

A. Non-Citizens With Simple Possession Offenses Are Currently Subject to Removal Under the Immigration and Nationality Act.

The immigration statute imposes severe immigration penalties for virtually every non-citizen convicted of a simple possession offense. Non-citizens with possession convictions are deportable under 8 U.S.C. § 1227(a)(2)(B), which provides that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

The question in this case is whether these non-citizens should also be subjected to the *additional* penalties the

Immigration and Nationality Act (INA) reserves for non-citizens with drug trafficking convictions, who are treated as aggravated felons under the immigration laws. As aggravated felons, non-citizens convicted of drug trafficking are barred from virtually all forms of discretionary relief from removal, including cancellation of removal and asylum, two forms of humanitarian relief typically available in removal proceedings.[2] They are also permanently barred from naturalized U.S. citizenship.

B. If Treated As Traffickers, Non-Citizens With Simple Possession Convictions Would Be Categorically Barred From Discretionary Cancellation of Removal.

Cancellation of removal is a form of discretionary humanitarian relief available to longtime lawful permanent residents who are deportable. Lawful permanent residents are statutorily eligible for cancellation of removal if they have been lawfully admitted as permanent residents for at least five years, have spent seven continuous years in the United States, and have not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). If a lawful permanent resident demonstrates eligibility, an

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[2] Lawful permanent residents with aggravated felony convictions are also ineligible for family hardship discretionary waivers under 8 U.S.C. § 1182(h) and voluntary departure under 8 U.S.C. § 1229c(b)(1)(C). Lawful permanent residents without aggravated felonies are eligible for discretionary relief under Section 1182(h) if they can demonstrate seven years of continuous residence in the United States and that denial of admission would result in extreme hardship to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident. Voluntary departure is a form of discretionary relief that allows non-citizens to leave within a designated period of time and avoid the burden of removal proceedings.

immigration judge holds an individualized hearing, during which she considers the equities of the non-citizen's case, including work history, family ties in the United States, community involvement and charity work, length of residence, and rehabilitation from any criminal history. *See In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

A grant of cancellation relief is not automatic upon a showing of statutory eligibility. The immigration judge retains the discretion to deny relief even in cases where a non-citizen is statutorily eligible for cancellation of removal. As the Court has observed in the context of former INA § 212(c), the statutory predecessor to cancellation of removal, "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *INS v. St. Cyr,* 533 U.S. 289, 307 (2001).

If our community members who have simple possession convictions are treated as traffickers and labeled "aggravated felons," they would be barred from cancellation of removal and summarily subjected to removal.[3] An immigration judge would be prohibited from considering even the most compelling individual circumstances,

[3] Immigrant survivors of domestic violence who are otherwise eligible for a special form of cancellation of removal created by the Violence Against Women Act (VAWA), codified at 8 U.S.C. § 1229b(b)(2), would similarly be subject to summary removal because their possession conviction, if treated as an aggravated felony, would prevent them from meeting the "good moral character" requirement of that form of relief. *See* 8 U.S.C. § 1229b(b)(2)(C); 8 U.S.C. § 1101(f). Cut off from VAWA cancellation relief, these domestic violence victims would face permanent separation from their U.S. citizen children and other family members.

including lengthy residence in the United States,[4] U.S. citizen children and spouses, and demonstrated rehabilitation from a possession conviction.

- Lindy Letisha Simon entered the United States as a lawful permanent resident (LPR) in 1974, when she was 11 years old. Thirty years later, she is a devoted mother and grandmother to a U.S. citizen son and grandson, the wife of an LPR, and a home health aide who is deeply connected to her community in Brooklyn, New York. Ms. Simon's employers characterize her as hard-working and dependable, and numerous community members attest to her devotion to her son. Ms. Simon has only one conviction, for possession of marijuana in 1998, for which she was sentenced to five years probation. Ms. Simon, who is from Trinidad and Tobago, was placed in removal proceedings because of this conviction, and applied for cancellation of removal under 8 U.S.C. § 1229b(a). The immigration judge granted her application for relief, but the Board of Immigration Appeals (BIA) reversed, holding that Ms. Simon is statutorily barred from cancellation because her possession offense constitutes trafficking under 8 U.S.C. § 1101(a)(43)(B).[5]

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[4] *Cf.* Aggravated Felonies and Deportation: How Often is the Aggravated Felony Statute Used? (June 9, 2006), http://www.trac.syr.edu/immigration/reports/158/ (reviewing cases from mid-1997 to May 2006, and concluding that individuals charged with removability based on aggravated felonies have been in the United States on average for 15 years).

[5] *See In re Simon* (BIA May 4, 2006); Respondent's Brief in Opposition to the Appeal of the Department of Homeland Security and in Support of the Decision of the Immigration Judge, *Matter of Simon* (BIA Dec. 12, 2005); Oral Decision of the Immigration Judge, *Matter of Simon* (Immigration Court, New York, NY Sept. 27, 2004). In a letter

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C. If Treated As Traffickers, Non-Citizens With Simple Possession Convictions Would Be Categorically Ineligible For Asylum.

Non-citizens who have suffered past persecution or who face a well-founded fear of persecution in their home countries are eligible for asylum under 8 U.S.C. § 1158. A conviction for a "particularly serious crime" is a statutory bar to asylum. 8 U.S.C. § 1158(b)(2)(B)(i). An individual convicted of an aggravated felony is automatically deemed to have been convicted of a "particularly serious crime." *Id.*

As with cancellation of removal, if a non-citizen demonstrates statutory eligibility for asylum, an immigration judge considers the facts of her case at an individualized hearing, during which the non-citizen and the government may present written and oral testimony and argument. Eligibility alone does not result in a grant of asylum. An immigration judge may deny asylum even in a case where a non-citizen is statutorily eligible.

If our community members who have possession convictions are treated as drug traffickers and labeled "aggravated felons," they would be categorically barred

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dated June 14, 2006, amici alerted the Clerk of the Court that this brief would refer to several documents which are not readily available on the Internet or electronic databases. These documents are the types of materials of which the Court may take judicial notice, but in order to avoid any inconvenience to the Court, amici have not sought permission to lodge these materials with the Clerk of the Court at this time. As stated in the letter, amici are prepared to lodge copies of these materials should the Court wish to review them.

from eligibility for asylum, even in cases where they could demonstrate severe persecution abroad.[6]

- Ilya Petrovich Gutnik entered the United States as a refugee in 1993, after he and his parents fled religious persecution in Ukraine, where they experienced violence and harassment because of their Jewish faith, and where Mr. Gutnik suffered a broken collarbone and nose, a puncture wound to his skull, and a severe scalp burn from a scalding stick. After his arrival in the United States, Mr. Gutnik had low self-esteem and became involved with drugs. He was arrested in 2000 for possession of 0.4 grams of heroin, receiving two years of probation under Illinois law. After undergoing drug treatment, Mr. Gutnik turned his life around, enrolling in college – where he earned a 4.0 grade point average – and obtaining a job helping teens overcome drug addiction. In 2002, Mr. Gutnik was placed in removal proceedings. He was deemed ineligible for asylum because his possession conviction was considered an aggravated felony.[7]

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[6] If classified as aggravated felons, victims of human trafficking with drug possession convictions would similarly face return to their country of origin, where they could experience retaliation and brutality by international human trafficking syndicates. Human trafficking victims who have obtained a temporary T visa under 8 U.S.C. § 1101(a)(15)(T) are barred from adjustment to lawful permanent residence if they have been convicted of an aggravated felony, because such a conviction is a bar to the required showing of good moral character. *See* 8 U.S.C. § 1255(1)(B); 8 U.S.C. § 1101(f).

[7] The immigration judge in Mr. Gutnik's case granted him withholding of removal under 8 U.S.C. § 1231(b)(3). *See* Petition for Review of an Order of the Board of Immigration Appeals, *Gutnik v. Gonzales*, No. 05-3007 (7th Cir. Sept. 19, 2005). Mr. Gutnik was statutorily eligible for withholding despite the immigration judge's conclusion that

(Continued on following page)

D. If Treated As Traffickers, Non-Citizens With Simple Possession Convictions Would Be Permanently Barred From Citizenship.

If treated as drug traffickers, non-citizens with simple possession offenses would not only be barred from cancellation and asylum, but would also be prohibited from ever naturalizing and becoming U.S. citizens. To naturalize, a non-citizen ordinarily must establish that, among other things, she has been a person of "good moral character" within the five years prior to her naturalization application, and that she has continued to exhibit good moral character during the pendency of the application. 8 U.S.C. § 1427(a). A non-citizen convicted of an aggravated felony after 1990 is statutorily barred from establishing good moral character, and is therefore permanently barred from naturalization. 8 U.S.C. § 1101(f)(8).

The lives of our community members with possession convictions illustrate that many of them are the types of individuals whom we should encourage to naturalize: many have lived most of their lives as upstanding residents of the United States, and have been rehabilitated since their single drug possession conviction.

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his possession conviction constituted an aggravated felony because his sentence did not exceed five years. *See* 8 U.S.C. § 1231(b)(3)(B)(ii) (aggravated felony conviction with sentence of at least five years is per se "particularly serious crime" barring eligibility for withholding). Unlike asylum, withholding does not permit Mr. Gutnik to adjust his status to lawful permanent residence under 8 U.S.C. § 1159(b), nor can he ultimately naturalize. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). Instead, Mr. Gutnik faces the constant possibility of removal to a third country. *Id.* Further, the standard for withholding is far more stringent than that for asylum, and thus, withholding is not available to many people who meet the well-founded fear of persecution asylum standard. *See id.* at 449.

- Gerald Harris is a 59-year-old lawful permanent resident who has lived in the United States since December 1985. He and his partner Lisa, a U.S. citizen, have two U.S. citizen children. Mr. Harris is an Oxford graduate who owns his home in Wheaton, Illinois, and has an exemplary employment record. He has been arrested or convicted only once in his life, in January 1999, for possession of 2.7 grams of cocaine. He was sentenced to probation and 30 hours of community service. Mr. Harris would like to naturalize and remain in the United States with his family. Unfortunately, however, he was placed in removal proceedings because of his possession conviction. If his possession offense is considered an aggravated felony, Mr. Harris can never naturalize because he is statutorily barred from meeting the good moral character requirement under 8 U.S.C. § 1101(f)(8).[8]

ARGUMENT

I. The Court Should Recognize the Clear Statutory Distinction Between Trafficking and Simple Possession.

The plain language of 8 U.S.C. § 1101(a)(43)(B) and available legislative history show that Congress has drawn a line between simple possession and trafficking crimes. Section 1101(a)(43)(B) nowhere mentions possession, instead referring twice to the term "trafficking." *See*

[8] Memorandum for Leave to File for Cancellation of Removal, *Matter of Harris* (Immigration Court, Chicago, IL May 26, 2004); Letter from Gerald Harris to Jayashri Srikantiah (June 2, 2006) (on file with Jayashri Srikantiah, counsel for amici).

8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance . . . including a drug trafficking crime. . . ."). The "ordinary or natural" meaning (*Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)) of "trafficking" is an offense that involves an element of trade, exchange, distribution for remuneration, or sale, rather than mere possession. *See* Black's Law Dictionary 1534 (8th ed. 2004).

A reading of § 1101(a)(43)(B) to include trafficking, but not simple possession, is supported by the text immediately following that statutory section. Section 1101(a)(43)(C) makes "illicit trafficking in firearms or destructive devices" an aggravated felony. This definition excludes firearms possession. *See* Brief of Amici Curiae NYSDA Immigrant Defense Project et al. [hereinafter "IDP Amicus Br."]. A consistent reading of the statute as a whole requires trafficking in both the drug and firearms contexts to refer to trading, exchanging, and selling, not mere possession.

The distinction between trafficking and simple possession is illustrated by the lives and stories of our community members, some of who have no criminal history beyond a single conviction for drug possession.

- Ruben Prado-Rivera is a lawful permanent resident who came to the United States from Mexico when he was 14 years old. He has lived in the United States for 32 years, and has a strong work history. His four children and his parents are U.S. citizens, and his wife is a lawful permanent resident. In 2000, Mr. Prado-Rivera was convicted of possession of less than one gram of cocaine. It was his only conviction, and he received no jail time for the offense. Mr. Prado-Rivera was placed in removal proceedings in

> 2002 because of his possession conviction. The immigration judge characterized his possession conviction as a trafficking offense, and hence, an aggravated felony, and found him ineligible for cancellation of removal under 8 U.S.C. 1229b(a), subjecting him to mandatory deportation without an opportunity to apply for discretionary relief.[9]

Consistent with these stories, in various contexts outside the immigration laws, Congress has recognized the distinction between trafficking and simple possession, applying lesser penalties to simple possessors than to traffickers. For example, in the criminal sentencing context, penalties for individuals who "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance are significantly harsher than penalties for "simple possession" of that substance. *See* 21 U.S.C. §§ 841, 844. For many substances, simple possession is punishable with a maximum of one year imprisonment, while distribution is punishable with a minimum of five years. *See id.*

Even in the bill that added the "aggravated felony" definition to the INA, Congress differentiated between trafficking and simple possession offenses regarding discretionary denials of federal benefits, establishing longer periods during which benefits can be denied to those convicted of trafficking than to those convicted of simple possession. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 5301, 102 Stat. 4181, 4310 (1988). Indeed, Senator D'Amato, one of the proponents of the bill's immigration provisions, saw the provisions as "focusing on

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[9] The BIA affirmed. Petition for Writ of Habeas Corpus, *Prado-Rivera v. Ridge*, No. B-04-098 (S.D. Tx. Jun. 17, 2004).

a particularly dangerous class of 'aggravated alien felons,' that is, aliens convicted of murder, and drug and firearms trafficking." 134 Cong. Rec. S17301, S17318 (1988).

The characterization of § 1101(a)(43) as targeting especially destructive criminals, such as drug traffickers, does not contemplate our community members who are longtime, contributing members of our society, and whose convictions are for simple possession.

- Maurilio Garibaldi entered the United States in 1985 and became a lawful permanent resident (LPR) in 1990. He is married to a U.S. citizen and has five U.S. citizen children. He has been continuously employed by the same employer since 1990. In 1999, Mr. Garibaldi was convicted of possession of cocaine and was sentenced to two years probation and no jail time. In 2004, his conviction was vacated, and he pled guilty under the Illinois first offender statute. Mr. Garibaldi was nevertheless placed in removal proceedings in 2004, and the immigration judge held that his possession conviction constituted an aggravated felony, barring him from cancellation of removal under 8 U.S.C. § 1229b(a).[10]

The statutory evolution of the "drug trafficking crime" definition in 18 U.S.C. § 924(c)(2) also illustrates the traditional distinction between trafficking and simple possession. The original language of § 924(c)(2) unambiguously excluded simple possession offenses, defining "drug trafficking crime" as "any felony in violation of Federal law

[10] The BIA affirmed, and Mr. Garibaldi's case is pending before the Seventh Circuit Court of Appeals. Brief and Required Short Appendix of Petitioner, *Garibaldi v. Gonzales*, No. 05-2716 (7th Cir. Aug. 24, 2005).

involving the distribution, manufacture, or importation of any controlled substance." *See* 18 U.S.C. § 924(c)(2) (1982 & Supp. IV 1986). Congress's 1988 modification of the definition has been interpreted merely to clarify the types of trafficking crimes and trafficking conspiracy crimes that are included, rather than to broaden dramatically the categories of offenses the definition covers. *See* IDP Amicus Br.

Reading the term "trafficking" to include the offense of simple possession would punish lawful permanent residents who are well-established, positive contributors to American society and whose sole or most serious conviction is for simple possession.

- Lawful permanent resident Maria Romo has lived in the United States for 23 years, since she was 18 years old. She has three U.S. citizen children, a lawful permanent resident husband, and a U.S. citizen sister. Ms. Romo had no criminal record when she was arrested in 1993, after police found in her car marijuana belonging to a friend of her sister. With little knowledge of the legal system, she followed the advice of her criminal defense attorney, and accepted a deferred adjudication under the Texas Code of Criminal Procedure. No conviction was entered into her record, and, in accordance with then-applicable Fifth Circuit precedent, Ms. Romo was told that her plea would carry no immigration consequences. In 1997, however, Ms. Romo was detained and placed in removal proceedings. She was found to be statutorily ineligible for cancellation of removal under 8 U.S.C. § 1229b(a) because

her deferred adjudication for simple possession was treated as an aggravated felony.[11]

II. The Rule of Lenity Compels An Interpretation That Recognizes the Distinction Between Simple Possession and Trafficking.

Should the Court find that the plain language of 8 U.S.C. § 1101(a)(43) is ambiguous in distinguishing between drug trafficking and drug possession, the "long-standing principle" of lenity demands that the statute be construed narrowly, "in favor of the alien." *St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). The Court in the present instance is confronted with a criminal statute carrying serious criminal (*Toledo-Flores*) and immigration (*Lopez*) consequences. The rule of lenity applies with full force in both contexts. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

The rule of lenity – requiring narrow construction of ambiguous statutes – is a robust, ancient principle, articulated in the Court's earliest criminal and immigration jurisprudence. It has long been applied to criminal statutes. *See, e.g., United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). The rule demands strict construction in favor of

[11] Declaration of Maria de Jesus Romo in Support of Petition for Writ of Habeas Corpus and Motion for Modification of Judgment, *State v. Romo*, No. 93-012-3041 (24th Judicial Dist., Tex. July 7, 2003).

criminal defendants to promote "fair notice," "minimize the risk of selective or arbitrary enforcement," and "maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Because the Court has long sought to avoid "imputing to Congress an undeclared will," *Bell v. United States*, 349 U.S. 81, 83 (1955), it has reaffirmed the dictum that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000). Given the stakes of criminal conviction and the presence of multiple readings of a statute, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States v. Universal*, 344 U.S. 218, 222 (1952).

The immigration rule of lenity similarly accounts for the dire consequences of deportation. *See Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss 'of all that makes life worth living.'") (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)); *see also Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("The stakes are indeed high and momentous for the alien who has acquired his residence here."). The Court has reaffirmed the rule of lenity in immigration cases time and again, even as applied to particularly violent crimes. The Court long ago recognized the importance of the rule of lenity in deportation cases in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), addressing a petitioner previously sentenced to life imprisonment for two counts of murder. The Court concluded that "because deportation is a drastic measure and at times the equivalent of banishment or exile . . . we will not assume that Congress means to trench on [] freedom beyond that which is required by the

narrowest of several possible meanings of the words used." *Id.* at 10. The Court has consistently applied the rule of lenity to statutes with deportation consequences, across crimes and statutes varying greatly in levels of severity and ambiguity. *Compare Barber v. Gonzales*, 347 U.S. 637 (1954) (invoking lenity to define "entry" as applied to a foreign-born U.S. national convicted of assault with a deadly weapon and second degree burglary); *with Bonetti v. Rogers*, 356 U.S. 691 (1958) (invoking lenity to interpret "entry" as applied to a former criminal Communist Party member); *and Costello v. INS*, 376 U.S. 120 (1964) (invoking lenity to construe the word "is" as applied to a former citizen whose citizenship was revoked after two separate offenses of income tax evasion).

In *Lopez*, as in the Court's recent decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the ambit of the term "aggravated felony" as applied to removal cases is in question. The Court's inquiry in *Leocal* turned on whether a non-citizen's offense of driving under the influence of alcohol could be broadly construed as a "crime of violence" under 18 U.S.C. § 16(b), and thus an "aggravated felony" under 8 U.S.C. § 1101(a)(43). The Court rejected such an expansive reading of 18 U.S.C. § 16(b) on the basis of its plain language, but observed that "even if [it] had lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor" under the rule of lenity. 543 U.S. at 12.

Here, the narrowest construction of 8 U.S.C. § 1101(a)(43), and the one most consistent with the rule of lenity, does not construe "illicit trafficking" to encompass drug possession, with the effect of transforming the latter into an aggravated felony. The distinction between selling drugs for profit and possessing them for personal use

would, under the Government's reading, be blurred. The consequence of such a reading for many non-citizens is stark: they would subsequently be deemed aggravated felons, subject to deportation without immigration judge discretion even to consider requests for humanitarian relief from removal.[12] This flouts the rule of lenity by significantly increasing the number of non-citizens who would be barred from discretionary relief and naturalization. The reading most consistent with the rule of lenity follows the narrow construction articulated by Amici NYSDA Immigrant Defense Project et al., in which a trafficking offense must actually involve an element of trade, exchange, or sale. Similarly, in *Toledo-Flores* – which involves both immigration and criminal statutes – the rule of lenity requires a narrow interpretation.

III. Consistent With the Rule of Lenity, the Statute Should Be Interpreted to Avoid Subjecting Non-Citizens to Permanent Separation From Family and Community.

A. Decorated Combat Veterans Who Have Risked Their Lives for This Country, and Who Have Only Simple Possession Convictions, Should Not Be Treated As "Aggravated Felons" and Barred From Discretionary Relief.

Our community includes lawful permanent residents who have served in the U.S. military.[13] War veterans may

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[12] In a recent decision, Judge Posner observed: "The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzales-Gomez v. Achim*, 441 F.3d 532, 535 (7th Cir. 2006).

[13] As of 2003, more than 37,000 lawful permanent residents serve in the U.S. military, comprising approximately 2.7% of the U.S. Armed

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suffer post-traumatic stress disorder (PTSD) upon re-integration to the United States.[14] According to a U.S. Department of Veteran Affairs fact sheet, "[s]urvivors may turn to alcohol and drug abuse when they want to avoid the bad feelings that come with PTSD symptoms. Many people use alcohol and drugs as a way to try to cope with upsetting trauma symptoms. . . ."[15]

As with their citizen counterparts, with treatment, non-citizen veterans are able to recover from their addiction, and live successful lives free of drugs. These veterans should not be punished as drug traffickers and barred from discretionary cancellation of removal, through which they could demonstrate rehabilitation to an immigration judge.

- Alberto Torres served honorably in the U.S. Navy from 1989 to 1995, and was noted by his supervisors for his "outstanding" and "superior" performance. He has been a lawful permanent resident of the United States since 1978, and his

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Forces. *See Hearing on H.R. 1685, H.R. 1714, H.R. 1799, H.R. 1275, H.R. 1814 and H.R. 1850 Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary*, 108th Cong. 1 (2003) (statement of Rep. Hostettler). Approximately 11,800 members of the National Guard and Reserve are non-citizens, out of a total of 1,353,000. *See id.*

[14] According to two recent studies, whereas the estimated lifetime prevalence of post-traumatic stress disorder amongst adult Americans is 5% for men and 10.4% for women, the numbers for American Vietnam theater veterans are 30.9% and 26.9% respectively. U.S. Department of Veteran Affairs, Epidemiological Facts about PTSD, http://www.ncptsd.va.gov/facts/general/fs_epidemiological.html (last visited June 13, 2006) (summarizing National Vietnam Veterans Readjustment Survey and National Comorbidity Survey Report).

[15] Eve B. Carlson, Ph.D. & Joseph Ruzek, Ph.D., *Effects of Traumatic Experiences: a National Center for PTSD Fact Sheet*, http://www.ncptsd.va.gov/facts/general/fs_effects.html (last visited June 13, 2006).

parents, wife, and three children are all U.S. citizens. He has a strong employment history, and he and his wife own their home and several other properties in the U.S. In 2004, Mr. Torres was convicted of possession of less than one gram of cocaine. He has no other criminal record. Subsequent to his conviction, a Texas criminal court granted his motion for a new trial and dismissed his indictment, upon a motion of the district attorney. Nonetheless, Mr. Torres was placed into removal proceedings, and an immigration judge deemed his original possession conviction to be an aggravated felony. Mr. Torres was found to be statutorily ineligible for cancellation of removal under 8 U.S.C. § 1229b(a), and ordered deported.[18]

- Decorated U.S. Navy veteran A.S. left the Philippines for the United States at the age of nine. He enlisted in the U.S. Navy in 1990, and served in Operations Desert Shield and Desert Storm as well as in Somalia. For his service Mr. S received numerous awards, including the National Defense Award, a Navy Unit Commendation, and the Gold Star. While in service, he married and had three U.S. citizen children. Unfortunately, once his military service was complete, he became depressed and developed a short-lived drug habit. Mr. S pled guilty to two possession offenses less than a month apart in December 2002 and January 2003. He completed a substance abuse program immediately thereafter. Mr. S was placed in removal proceedings in 2003, but the Department of Homeland Security ultimately exercised prosecutorial discretion in his case, and

[18] *See* Brief for Petitioner, *Torres v. Gonzales*, No. 05-60906 (5th Cir. Feb. 6, 2006).

his proceedings were terminated.[17] Under the government's interpretation of 8 U.S.C. § 1101(a)(43)(B), individuals like Mr. S would be subjected to mandatory removal.[18]

B. Treating Non-Citizens With Simple Possession Convictions As "Aggravated Felons" Separates U.S. Citizen Children From Their Parents.

Many of our community members are immigrants in mixed-status families, in which lawful permanent residents are spouses and parents of U.S. citizens. If lawful permanent residents with simple possession convictions are treated as traffickers, U.S. citizen children will lose their parents, and U.S. citizen parents will lose their spouses. This separation has a particularly distressing effect on low-income families who cannot afford to fly their children to faraway countries to visit their permanently exiled non-citizen parents. Removal may also mean eliminating financial support from a primary family bread-winner. Children of parents ordered removed will suffer the difficulties of losing the financial and emotional support of a parent.

Longtime permanent resident parents with simple possession convictions should be entitled to a discretionary

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[17] Exercises of prosecutorial discretion are extremely rare. Mr. A.S. would be barred from naturalizing if his possession conviction is deemed an aggravated felony.

[18] Respondent's Pre-Hearing Brief, *Matter of A.S.* (Immigration Court, Eloy, AZ May 15, 2003). Mr. S's attorney requested that his initials be used in this brief to protect his privacy.

cancellation of removal hearing in which they can demonstrate family ties to U.S. citizen children and spouses.

- Erick Ibarra-Cruz is a citizen of Guatemala who became a lawful permanent resident of the United States in 1984. He has twin sons who are U.S. citizens. Their mother, Mr. Ibarra's former spouse, died in 1999, leaving him as their sole provider. Mr. Ibarra's only conviction is for possession of less than 15 grams of cocaine – the lowest amount that could be charged under the applicable statute – for which he received two years of first-offender probation. Mr. Ibarra was placed in removal proceedings in 2003 based on this conviction. Because the immigration judge deemed his possession conviction to be a trafficking offense, and thus an aggravated felony, he was statutorily barred from applying for cancellation of removal under 8 U.S.C. § 1229b(a).[19]

C. Under the Government's Interpretation, Lawful Permanent Residents Who Have Never Served Time for Minor Possession Offenses Would Be Subject to Mandatory Deportation.

Some of our community members have never served any time for their drug possession convictions. The immigration penalty of mandatory deportation and ineligibility for

[19] The BIA summarily affirmed the decision of the immigration judge. Petitioner-Appellants' Brief and Required Short Appendix, *Ibarra-Cruz v. Gonzales*, No. 05-2828 (7th Cir. Sept. 23, 2005).

naturalization are far more severe than any criminal penalty imposed in their cases.[20]

Under the government's position, a non-citizen who has deep ties to the United States, and who pleads guilty to a possession offense (even if he did not know the immigration consequences of doing so at the time), would be subject to mandatory deportation. This would be true even in cases where the non-citizen never served any time for his conviction, and where the non-citizen can demonstrate rehabilitation and deep ties to the United States.

- Martin Abundis is a popular executive chef at Chez Zee restaurant in Austin, Texas.[21] Mr. Abundis is a lawful permanent resident who has lived in the United States since he was 15 years old.[22] In 1995, Mr. Abundis was convicted of possession of less than one gram of cocaine, and was sentenced only to probation.[23] That was his only conviction. Mr. Abundis is now an executive chef at an acclaimed restaurant, and is a regular fixture

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[20] Under the law of some states, non-citizen defendants who do not face incarceration for misdemeanor possession offenses may not be appointed counsel during their criminal proceedings. *See, e.g.*, Colo. Rev. Stat. Ann. § 16-5-501 (2006) (Colorado); Fla. Stat. Ann. § 27.512 (2006) (Florida); Mass. Gen. Laws Ann. ch. 211D, § 2A (2006) (Massachusetts).

[21] *See* Lynette Oliver, *Chefs: Martin Abundis, Chez Zee*, The Good Life, Dec. 2001, at 36; Dale Rice, *Heaven Arrives, via the Dessert Cart*, Austin American Statesman, Nov. 20, 2000, at C2; Dale Rice, *Aside from Some Quibbles, Chez Zee Earns a "Mais Oui,"* Austin American Statesman, Dec. 16, 2004, at 6XL; *Five Chefs, 10 Years, One Good Cause*, Austin American Statesman, Oct. 12, 2005, at E3.

[22] Oliver, *supra* n.20, at 36.

[23] Letter from Simon Azar-Farr, attorney for Mr. Abundis, to Marc Moore, Field Office Director, U.S. Citizenship and Immigration Services (Nov. 18, 2005) (on file with Jayashri Srikantiah, counsel for amici).

on the Austin culinary scene, with deep ties to the community. His wife and three children are U.S. citizens, and all are registered parishioners of the local Catholic church.[24] In 2005, Mr. Abundis was placed in removal proceedings because of his possession conviction. More than twenty individuals wrote letters of support in Mr. Abundis's case, including the former mayor of Austin.[25] Under the law of the Fifth Circuit, however, Mr. Abundis is statutorily ineligible for cancellation of removal under 8 U.S.C. § 1229b(a) because of his possession conviction.[26]

D. If Treated as Traffickers, Non-Citizens With Simple Possession Convictions Face Deportation to Countries Where They Suffered Persecution.

The effect of mandatory deportation is particularly severe for non-citizens who have come to this country to flee persecution abroad. These individuals may suffer from the ongoing traumatic effects of persecution and torture, and some may make the mistake of temporarily turning to drugs or alcohol to cope. However, the lives of our community members illustrate that asylum-seekers can and do rehabilitate themselves from the unfortunate decision to turn to drugs, and any resulting possession conviction.

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[24] *See id.* (attaching letter from church).

[25] *See id.* (attaching letter from Kirk Watson, former Mayor of Austin).

[26] *See Salazar-Regino v. Trominski*, 415 F.3d 436 (5th Cir. 2005), *petition for cert. pending*, No. 05-830 (filed Dec. 22, 2005).

- Jose Sanchez Carbonell fled persecution from Cuba, where he experienced harassment and torture by the police because of his sexual orientation. He was paroled into the United States for humanitarian reasons. Mr. Sanchez was later diagnosed with mild schizophrenia. In 2002, Mr. Sanchez was arrested for possession of less than 1 gram of cocaine in California, and was sentenced to three years probation and a $200 fine. He was subsequently placed in removal proceedings, and applied for asylum. Under the government's position, Mr. Sanchez would be ineligible for asylum because of his drug possession conviction.[27]

CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse the decisions of the courts of appeals.

June 19, 2006

Respectfully submitted,

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[27] *See* Respondent's Pre-Hearing Statement, *Matter of Sanchez Carbonell* (Immigration Court, Chicago, IL Mar. 14, 2006). Mr. Sanchez was granted withholding of removal under 8 U.S.C. § 1231(b)(3), for which the standard is much higher than asylum. *See supra* n.7. A grant of withholding of removal also does not provide a pathway to legal permanent residence or citizenship. *See id.*

DESCRIPTION OF AMICI

The **Asian American Justice Center (AAJC)** is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing public policy, advocacy, and community education on a wide range of issues that affect the Asian Pacific American community. Immigration law and policy has a particular impact on the Asian Pacific American community because over two-thirds of our community is foreign-born.

The **Asian American Legal Defense and Education Fund (AALDEF)**, founded in 1974, is a New York-based non-profit organization that defends the civil rights of Asian Americans nationwide through litigation, legal advocacy, and community education. Since the September 11th tragedy, AALDEF has provided legal services to individuals in deportation proceedings and has supported the work of community-based organizations in their advocacy and organizing efforts against unjust deportation policies and the selective targeting of their communities for immigration enforcement.

The **Asian Law Caucus** promotes, advances, and represents the legal and civil rights of the Asian and Pacific Islander communities. The Immigrant's Rights Project at the Asian Law Caucus provides direct representation to individuals facing detention and deportation before immigration courts, the Board of Immigration Appeals (BIA) and the Ninth Circuit Court of Appeals. The Caucus handles numerous applications for cancellation of removal and other forms of criminal waivers for community members facing deportation as a result of prior criminal convictions.

BEST AVAILABLE COPY

Asian Pacific American Legal Center of Southern California (APALC) was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services to indigent members of the community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Pacific Americans. APALC has worked in the areas of immigration and immigrants' rights since its founding.

CASA of Maryland is a non-profit agency founded in 1985 that provides multiple services including immigration assistance, employment rights legal representation, employment training and job placement, leadership training, and education to the immigrant and refugee community in Maryland. In addition to providing direct services, CASA organizes domestic workers and women, day laborers, and tenants to work together to build better neighborhoods and stronger communities. CASA also actively involves community members in advocacy efforts that include comprehensive immigration reform. CASA is an active member of the National Capital Immigration Coalition.

The Catholic Legal Immigration Network, Inc. (CLINIC), a subsidiary of the U.S. Conference of Catholic Bishops, is a legal support agency for a national network of 159 charitable programs for immigrants. Its member agencies provide extensive legal representation to persons deemed "aggravated felons," including those with simple possession convictions, under U.S. immigration law. CLINIC attorneys also provide direct legal services to detained immigrants who are facing removal – many as

aggravated felons – in various locations around the country.

The **Center for Gender & Refugee Studies (CGRS)**, based at the University of California, Hastings College of the Law, has a direct and serious interest in the development of immigration law and in the issues under consideration. Founded in 1999, CGRS provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender-related harm and is directly involved in national asylum law and policy across a wide range of issues. The questions under consideration implicate matters of great consequence to CGRS, involving important principles of jurisprudence and statutory construction, with broad ramifications for the uniform administration of the laws.

The **Coalition of Irish Immigration Centers (CIIC)** is a national umbrella organization that represents Irish immigrant organizations providing direct services to immigrants across the United States. CIIC currently has member organizations in New York, New Jersey, Philadelphia, Massachusetts, Illinois, Maryland, California, Wisconsin, Washington and the District of Columbia. CIIC is interested in this case because it is concerned with keeping families together and with ensuring that immigrants are treated fairly and have the opportunity to access to discretionary relief from deportation.

The **Cuban American Bar Association (CABA)** was established in Miami in 1974 by a group of approximately 20 Cuban attorneys adapting to a different culture. CABA now has nearly 2,000 members, representing all segments of the Cuban American legal community. CABA is actively

involved in protecting the human rights and legal interests of Cubans and Cuban Americans.

Families for Freedom (FFF) is a multi-ethnic network for immigrants and their families facing deportation. FFF is increasingly concerned with attempts to remove discretion from immigration judges by further expanding the aggravated felony definition. This expansion has led to the separation of our families without the opportunity for a meaningful hearing before an immigration judge and has resulted in U.S. citizen mothers becoming single parents; breadwinners becoming dependents; bright citizen children having problems in school, undergoing therapy, or being placed into the foster care system; and working American families forced to seek public assistance.

The **Hebrew Immigrant Aid Society (HIAS)**, the oldest international migration and refugee resettlement agency in the United States and the migration arm of the organized American Jewish community, advocates on behalf of refugees, asylum seekers, and immigrants, and for a strong U.S. government policy to offer safe haven to victims of persecution. HIAS believes that our immigration laws must provide a fair process that can make distinctions between immigrants who are a threat to society and those who, while having made mistakes in the past, should be allowed to remain with their families and contribute to their communities.

The **Hispanic National Bar Association (HNBA)** is a non-profit, national association representing the interests of over 27,000 Hispanic American attorneys, judges, law professors, law graduates, law students, legal administrators, and legal assistants or paralegals in the United States and Puerto Rico. The mission of the HNBA is to

improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. As a representative of the national Hispanic community, the HNBA also has an interest in promoting justice on issues of concern to Hispanic communities, including the fair implementation of the nation's immigration laws.

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to children involved in the juvenile justice and child welfare systems. JLC works to ensure children are treated fairly by these systems, and that children receive the treatment and services that these systems are supposed to provide, including, at a minimum, adequate and appropriate education, and physical and mental health care. JLC has also represented dependent children involved in immigration cases, and has participated as *amicus* in state and federal courts throughout the country, as well as the United States Supreme Court, in cases in which important rights and interests of children are at stake.

The **Lawyers' Committee for Civil Rights** is a civil rights and legal services organization devoted to advancing the rights of people of color, poor people, and immigrants and refugees. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. which was created at the behest of President John Kennedy in 1963. Since the early 1980s, the Lawyers' Committee has litigated scores of major class actions implicating the rights of immigrants and refugees. The organization also has assisted over a thousand individuals seeking asylum in the United

States, and is committed to preserving the rights of those who may now face persecution abroad as a result of simple possession convictions.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. As a national organization that provides technical assistance to advocates working with immigrant women and children, Legal Momentum has substantial knowledge and insight into issues of domestic abuse, sexual assault, human trafficking, asylum, immigration reform, and women's rights. As co-chair of the National Network to End Violence Against Immigrant Women, Legal Momentum played a leading role in crafting the immigration provisions in the Violence Against Women Act of 1994 and subsequent reauthorizations in 2000 and 2005.

A cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church - Missouri Synod and the Latvian Evangelical Lutheran Church in America, **Lutheran Immigration and Refugee Service (LIRS)** has been the U.S. Lutheran expression of service to refugees and migrants in America since 1939. From its beginnings helping refugees from Nazi Germany during World War II to its presence as advocates for the most vulnerable, LIRS seeks to bring new hope and new life to uprooted people all over the world through access to services, resources, and justice. For some 20 years, LIRS has held a special interest in asylum seekers, torture survivors, children and other vulnerable migrants in immigration detention. LIRS supports a nationwide network of legal service providers for those in immigration detention, and continues to advocate for humane and fair laws for all migrants.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous civil rights cases, in such areas as education, immigration, employment, and voting rights. Through MALDEF's Immigration Program, it has advocated for exclusive federal enforcement of immigration laws to ensure uniformity and consistency in our national immigration policies.

The National Center for Youth Law (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nationwide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL's concern in this case is the effect of the courts of appeals' decisions on the dependent children of parents facing deportation.

The National Council of La Raza (NCLR) – the largest national Hispanic civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR joins this brief to support the due process rights of Latino immigrants who are disproportionately affected by the intersection of immigration law with criminal law. NCLR believes that low-level nonviolent drug offenders should not be punished with deportation, and instead, would benefit from programs such as drug treatment and job training.

Founded in 1992, the **National Network to End Violence Against Immigrant Women (the Network)** is a coalition of domestic violence survivors, immigrant women, advocates, activist, attorneys, educators and other professionals working together to end domestic abuse of immigrant women. The Network is co-chaired by the Family Violence Prevention Fund, Legal Momentum, and ASISTA Immigration Technical Assistance Project. Together, these organizations use their special expertise to provide technical assistance, training, and advocacy to their communities. The Network significantly contributed to the passage of the 1994 Violence Against Women Act and has since continued to enhance the legal remedies available to immigrant survivors. Through a collaborative approach, the Network has made great progress in assuring that non-citizen victims of domestic violence, sexual assault, and trafficking are able to flee abuse, survive domestic violence crimes, and receive assistance.

The **New York Immigration Coalition** is an umbrella policy and advocacy organization with more than 150 member groups in New York that work to promote fairness and opportunity for today's immigrants and refugees.

The **Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF)** is a New York-based private not-for-profit civil rights litigation and advocacy organization that has defended the civil rights and equal protection under the law of Latinos for the past 34 years, with particular interest in protecting voting rights, employment opportunity, fair housing, language rights, educational access, and immigrants' rights. We are interested in this lawsuit because a disproportionately high number of Latino immigrants and their U.S. citizen family members are adversely harmed by the severe consequences that

flow from an aggravated felony finding, including enhanced sentencing, mandatory detention and removal, bars to immigration relief, long-term family separation, and other deprivations of civil rights.

The **Puerto Rican Bar Association (PRBA)** is a professional organization composed of members of the Bar and law students of Latino ancestry and other interested persons. The PRBA was founded to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional, and educational advancement of Latino attorneys, the Latino community and the administration of justice, including the fair implementation of the immigration laws of the United States in the Latino community.

U.S. Committee for Refugees and Immigrants (USCRI) is a Washington, D.C.-based non-profit organization with an eighty-year history of service to refugees and immigrants. It works through thirty-five community-based partners to provide direct assistance to immigrants. USCRI operates the National Center for Refugee and Immigrant Children, which provides *pro bono* legal services and social services to hundreds of unaccompanied immigrant facing immigration court removal proceedings in 10 major cities in the United States.

Supreme Court, U.S.
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No. 05-547

In The
Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE CENTER FOR COURT INNOVATION AND THE NEW YORK ASSOCIATION OF DRUG TREATMENT COURT PROFESSIONALS IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici submit this brief because they are concern
that adoption of Respondent's interpretation of the te
"drug trafficking crime" will render drug courts ineffecti
as a tool to combat drug use and drug-related crime
immigrant communities and will lead to the mandato
deportation of noncitizens who are successful graduates
drug court programs.

For nearly two decades, the criminal justice syst
has turned to drug courts to break the cycle of drug add
tion and drug-related crimes. Drug courts provide
alternative to punitive sanctions for drug possessi
offenders, offering regimented drug treatment in lieu
incarceration. By requiring factual admissions fr
defendants, drug courts are able to use the threat of j
and the promise of charge reduction or dismissal as
incentive to encourage treatment and retention.

Participation in drug courts affects citizens a
noncitizens differently. When a citizen participant h
successfully complied with treatment, factual admissio
about the underlying crime are expunged from his reco
However, even expunged drug court dispositions
classified as "convictions" for immigration purpos
Therefore, when a noncitizen successfully complies with
drug court program, he is still subject to deportation.
immigration judge may, however, consider a noncitize
participation in the program as a positive equity wh

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[1] Letters of consent have been filed with the Clerk pursuant
Rule 37.6. Amici state that no counsel for a party authored any par
the brief, and no person or entity other than amici and their cou
made a monetary contribution to the preparation or submission of
brief.

considering an application for discretionary relief. Thus, for a noncitizen, successful drug court compliance allows for the possibility of cancellation of removal.

If drug possession offenses are classified as aggravated felonies, noncitizens will be subject to mandatory deportation without discretionary review, regardless of their successful compliance with a drug court program.

Amici are organizations involved in providing training, technical assistance, and research to support the development of drug courts across the United States. Amici recognize that judicially supervised drug treatment offered through the courts has the power to change the behavior of drug offenders and improve public safety. Low rates of recidivism among the more than 150,000 drug court graduates are a powerful indication that society is best served by drug courts, which address the underlying drug abuse issues involved in non-violent drug possession offenses. Amici are troubled by the fact that Respondent's proposed interpretation of the "drug trafficking" aggravated felony ground would severely limit the states' ability to persuade noncitizen offenders to participate in drug court programs. Amici are concerned that such an expansive definition of the term "drug trafficking crime" would dramatically reduce drug courts' effectiveness in serving immigrant families and communities.

Amicus the **Center for Court Innovation** is a nonpartisan, non-profit entity dedicated to the spread of problem-solving justice on a national level. The organization performs research on problem-solving courts; conducts trainings to educate criminal and civil justice practitioners about the problem-solving model; and provides technical assistance to jurisdictions throughout the country on

strategies for implementing problem-solving initiatives. Since the Center's founding, it has been actively engaged in promoting the development of drug courts across the country.

Amicus the **New York Association of Drug Treatment Court Professionals** is the principal professional organization representing the interests of drug treatment courts in New York State. The multi-disciplinary membership includes judges, prosecutors, defense attorneys, treatment providers, probation staff and social workers. The Association seeks to enhance drug court program effectiveness by building capacity, offering training in evidence-based practices and forging partnerships among drug courts, public agencies and community based organizations.[2]

SUMMARY OF ARGUMENT

Drug courts, a much heralded development in the criminal justice field, depend on a "carrot and stick" approach to punish offenders and coerce drug treatment. The standard drug court procedure requires participants to plead guilty or admit facts sufficient for a conviction, but offers participants the chance to avoid a criminal conviction through full compliance with a drug treatment program.

[2] No judicial member of the New York Association of Drug Treatment Court Professionals participated in discussions about or the decision to file this brief.

Studies have shown that retention rates for drug court participants are significantly higher than retention rates for the general treatment population,[3] and have found lower recidivism rates among drug court participants than comparison groups composed of similar but non-participating defendants.[4]

Nonetheless, Respondent urges this Court to adopt a definition of "drug trafficking crime" that would undermine the effectiveness of drug courts by requiring the deportation of noncitizens who have successfully completed drug court programs.[5] If this Court follows Respondent's suggestion that any state felony drug possession must be classified as an "aggravated felony," a noncitizen

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[3] *See* AMANDA B. CISSNER & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND 'DO THEY WORK?' 4-5 (2005).

[4] *See* David B. Wilson, Ojmarrh Mitchell & Doris L. MacKenzie, A Systematic Review of Drug Court Effects on Recidivism (2003) (unpublished manuscript, on file with the Center for Court Innovation) (finding that thirty-seven out of forty-two studies showed reductions in recidivism rates among drug court participants relative to non-drug court participants). *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. 05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (2005) (finding recidivism reductions in the majority of programs studied); John Roman & Christine DeStefano, *Drug Court Effects and the Quality of Existing Evidence*, *in* JUVENILE DRUG COURTS AND TEEN SUBSTANCE ABUSE 107 (Jeffrey Butts & John Roman eds., 2004) (summarizing research on the effectiveness of drug courts in reducing recidivism, among other outcomes).

[5] Courts that have adopted Respondent's definition of aggravated felony have applied it retroactively. *See, e.g.*, *Salazar-Regino v. Trominski*, 415 F.3d 436, 448-49 (5th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3395 (U.S. Dec. 22, 2005) (No. 05-830) (upholding retroactive application of "drug trafficking" aggravated felony definition to state felony possession convictions).

who made the admissions necessary to participate in drug court will face mandatory deportation. This result follows from two basic facts: most drug courts focus on felony possession offenses, and the standard provisional pleas or stipulations required for participation in drug court programs are considered "convictions" for immigration purposes, even if they are later vacated or expunged pursuant to state law.[6] As a result, should this Court adopt Respondent's proposal to include in the term "drug trafficking crime" all state-level felony possession convictions, noncitizens who successfully complete drug treatment programs will be subject to mandatory deportation and mandatory bars to asylum, citizenship, and other forms of relief.[7]

Respondent's interpretation of the term "drug trafficking crime" will have the additional effect of discouraging noncitizens from participation in drug courts. If these noncitizens are precluded from receiving any discretionary relief from deportation, they will have less incentive to make the admissions required to participate in drug courts. Noncitizen offenders may choose to go to trial, which offers the chance of avoiding a conviction—and thereby avoiding an "aggravated felony" conviction for immigration purposes—rather than participate in drug courts, which will lead to mandatory deportation.

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[6] *See infra* text accompanying notes 39–41.

[7] In the Fifth Circuit, for example, felony possession deferred adjudication dispositions—like those resulting from participation in drug courts—are not convictions under Texas law, but are treated as aggravated felonies subjecting noncitizen drug court participants to mandatory deportation. *See Salazar-Regino*, 415 F.3d at 446–48.

By contrast, if this Court follows the approach of those circuits that do not treat a state felony drug possession conviction as an aggravated felony, noncitizen offenders who successfully complete a treatment program, conquer their substance abuse, and have their guilty plea vacated or expunged, may seek discretionary relief from the negative immigration consequences that follow a drug-related conviction.

The Court should therefore limit the term "drug trafficking crime" to offenses with a trafficking element in order to avoid undermining the ability of drug courts to address substance abuse and drug-related crime in immigrant communities.

BACKGROUND

Federal and state governments have recognized that drug courts provide an effective "carrot and stick" tool to rehabilitate drug possession offenders while at the same time reducing drug-related crime. The effectiveness of drug courts lies in their coercive power. Drug courts are designed to attain admissions of guilt from offenders prior to their participation. Those admissions of guilt provide the drug courts with important leverage: a participant who does not comply with the treatment program will face considerable punitive sanctions and will be sentenced for his original offense.

The success of drug courts led President George W. Bush to proclaim that:

> "[d]rug courts are an effective and cost efficient way to help non-violent drug offenders commit to a rigorous drug treatment program in lieu of

> prison. By leveraging the coercive power of the criminal justice system, drug courts can alter the behavior of non-violent, low-level drug offenders through a combination of judicial supervision, case management, mandatory drug testing, and treatment to ensure abstinence from drugs, and escalating sanctions."[8]

Drug courts represent a combined effort on the part of prosecutors, judges, defense attorneys, and federal and state governments to "break the cycle" of drug addiction and drug-related crime by using the threat of conviction to coerce drug court participants to comply with rehabilitation programs. Fueled by federal and state grants, the rapid expansion of drug courts across the country is indicative of a growing interest among state courts in innovative solutions to the problem of substance abuse and related criminal offenses.

A. Drug Courts Represent A "Carrot and Stick" Approach To Drug Possession Offenses, Leveraging The Coercive Power Of The Criminal Justice System To Ensure Successful Compliance

Drug courts are an innovative response to the failure of traditional criminal justice solutions to curb the

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[8] PRESIDENT GEORGE W. BUSH, A BLUEPRINT FOR NEW BEGINNINGS: A RESPONSIBLE BUDGET FOR AMERICA'S PRIORITIES 66 (2001). President William J. Clinton, who authorized the first federal funding for drug courts, similarly declared, "Three quarters of the growth in the number of federal prison inmates is due to drug crimes. Building new prisons will go only so far. Drug courts and mandatory testing and treatment are effective. I have seen drug courts work. I know they will make a difference." NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, 2006 DRUG COURT MONTH FIELD KIT 13 (2006).

incidence of crime[9] and drug use.[10] In order to reduce recidivism and improve public safety, federal and state governments have increasingly recognized the need for programs that confront the addiction underlying drug possession offenses. Drug courts, through the use of coercion-based treatment remedies which involve a negative sanction or penalty for non-compliance, are significantly more successful than treatment alone.[11] For this reason, local and federal officials have begun to endorse and encourage the development and expansion of drug courts. The drug courts that have emerged are the result of the coordinated efforts of the judiciary, prosecution, defense bar, probation, law enforcement, treatment, mental health, social services, and child protection services to intervene and break the cycle of substance abuse, addiction, and crime.

The first drug court was established in Dade County, Florida in 1989.[12] Since then, drug courts have spread across the country. As of December 2004, there were a total of 1,621 drug courts in the United States and, as of

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[9] *See* Donald A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 400–04 (1990) (noting that, in the absence of additional treatment interventions, more than half of all offenders, on average, recidivate within three years of their release from incarceration).

[10] *See* Sally L. Satel, DRUG TREATMENT: THE CASE FOR COERCION 2, AM. ENTER. INST., STUD. IN SOC. WELFARE 2 (1999) (noting high relapse rates in treatment-only programs).

[11] *See* discussion *infra* Background Part B.

[12] *See* John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, *in* THE EARLY DRUG COURTS 19, 22 (W. Clinton Terry III ed., 1999) (offering an in-depth look at the origins of the first drug courts).

May 2005, another 478 in the planning stages.[13] From 2004 to 2005 there was a thirty-seven percent increase in the number of drug courts nationwide.[14] New York State now has 164 drug courts with more being planned.[15] And, since the state implemented its first drug court in 1995, in New York alone 12,472 offenders have graduated from drug courts, with 7,233 offenders currently participating.[16]

Though the scope and nature of drug courts varies from state to state, all reflect recognition that the coercive leverage of the criminal justice system can be a powerful tool to combat substance abuse. All drug courts share certain common elements.[17] Most drug courts require an admission of guilt before a participant enters the program. Successful participants are offered a legal incentive for completion of the program, including vacatur of a plea and dismissal of charges, reduction of a felony to a misdemeanor, or favorable discharge from a probation term.

Before participating in a drug court program, defendants are screened for eligibility based on their criminal history, eligibility for drug treatment, and current case information.[18] Participation in drug court programs is

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[13] C. WEST HUDDLESTON, III ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 2 (2005).

[14] *Id.* at 3.

[15] CHIEF JUDGE JUDITH S. KAYE, NEW YORK STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY 15 (2006).

[16] OFFICE OF COURT DRUG TREATMENT PROGRAMS, NEW YORK STATE UNIFIED COURT SYSTEM, PROJECT MANAGER'S STATUS REPORT (2006).

[17] *See* NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997).

[18] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4, at 37–38.

generally limited to U.S. citizens and immigrants with legal status.[19] In addition, most drug court programs are reserved for defendants charged with drug possession or other nonviolent offenses.[20] A few drug courts extend eligibility to defendants charged with minor drug sales if the court determines that the seller was motivated by drug addiction.[21] Most drug court programs, however, are not accessible to defendants charged with drug trafficking crimes.[22] A defendant with a past or pending charge of distribution of a controlled substance, for example, is automatically denied access to the Utah drug courts;[23] the Harris County, Texas drug court excludes any defendant who has a pending charge for delivery of a controlled

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[19] Programs may require direct proof of status. They may also require proof of ability to arrange for payment for treatment, which typically involves Medicaid coverage. Medicaid coverage is limited to "qualified aliens" with legal status. *See* 8 U.S.C. §§ 1611, 1621.

[20] Any drug court program that allows participation by either current or past violent offenders cannot receive federal grants administered under the 21st Century Department of Justice Appropriations Authorization Act. 42 U.S.C. § 3797u(a)(1). *See* 42 U.S.C. § 3797u-2 (defining "violent offender.").

[21] Some drug courts, such as New York City's, primarily serve individuals arrested in street-level sales involving small amounts of controlled substances. *See* MICHAEL REMPEL ET AL., CENTER FOR COURT INNOVATION, THE NEW YORK STATE DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS 33, tbl. 3.2 (2003). The District Attorney scrutinizes drug sale cases carefully to ensure that the sale did not involve suspected heavy trafficking or involvement in an illegal commercial operation, and did not take place near school property. *Id.* at 14.

[22] *See* STEVEN BELENKO & TAMARA DUMANOVSKY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, Pub. No. NCJ-144531 PROGRAM BRIEF: SPECIAL DRUG COURTS 5 (1993) (noting that many drug courts handle only drug possession cases).

[23] Utah Drug Courts, http://www.utcourts.gov/drugcourts/#Eligible (last visited June 11, 2006).

substance;[24] the Gwinnett County drug court in Georgia excludes defendants when it is determined that he or she acted with an intent to sell or distribute drugs;[25] the Lane County, Oregon drug court excludes any defendant alleged by the District Attorney to be a drug dealer;[26] and the Ada County, Idaho drug court only accepts defendants charged with felony possession of a controlled substance or charged with a drug related property crime.[27]

This differentiation between possession and trafficking crimes is an important component of drug courts and reflects a jurisdiction's judgment about the appropriate punitive sanctions required for various offenses. For example, in a report commissioned by Chief Judge Judith S. Kaye and chaired by Robert B. Fiske, Jr. on the impact of drug cases on New York State courts, the commission recommended increasing the number of New York drug courts but from the outset drew a distinction between drug crimes committed by drug traffickers in the business of selling drugs for a profit, and cases involving nonviolent drug addicts whose drug and drug-related crime was motivated by their addiction. The Commission concluded that drug trafficking crimes "should continue

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[24] Harris County, TX Drug Court Criteria, http://www.justex.net/Drug%20court/Information/Drug%20Court%20Eligibility.pdf (last visited June 11, 2006) (describing eligibility criteria for the STAR adult drug court in Harris County, Texas).

[25] Gwinnett County, GA Drug Court, http://www.co.gwinnett.ga.us (last visited June 11, 2006).

[26] Lane County, OR Drug Court http://www.ojd.state.or.us/lan/drugcrt/index.htm (last visited June 11, 2006).

[27] Ada County Drug Court, http://www.adaweb.net/departments/prosecutor/DrugCourt.asp (last visited June 11, 2006).

to be prosecuted vigorously" and should not be eligible for admittance in drug treatment courts.[28]

B. Drug Courts, Many Supported By Federal Funding, Are Effective At Improving Public Safety And Reducing Recidivism Among Drug Possession Offenders

Proclaimed by the Director of the White House Office of National Drug Control Policy to be "[o]ne of the most significant criminal justice initiatives in the past twenty years,"[29] drug courts are a rare criminal justice intervention that demonstrates success at reducing recidivism rates among participants.

In 2005, the U.S. Government Accountability Office conducted a comprehensive survey of the effectiveness of drug courts and found evidence of consistent recidivism reductions.[30] A series of other recent evaluations have also concluded that drug courts reduce recidivism.[31] For example, a multi-site study by the Center for Court Innovation found that drug courts in New York State generated significant recidivism reduction over a three-year post-arrest period compared with similar non-participating

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[28] NEW YORK STATE COMMISSION ON DRUGS AND THE COURTS, CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM: A REPORT TO JUDGE JUDITH S. KAYE 5 (2000).

[29] John P. Walters, *Drug Courts Save Money and Get Better Results*, SAN JOSE MERCURY-NEWS, May 11, 2005, *available at* http://www.whitehousedrugpolicy.gov/news/oped05/051105.html.

[30] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4.

[31] *See supra* note 4 and accompanying text.

defendants.[32] Those who graduated from drug court were far less likely to recidivate: the study found a 71% reduction in recidivism for drug court graduates.[33]

The success of drug courts is in large part attributable to the role of coercion in inducing defendants to participate in substance abuse treatment for meaningful periods of time. Whereas residential treatment facilities have one-year retention rates ranging from only 10 to 30%, drug courts nationally retain an average of 60% of their participants after one year.[34] Though the drug court movement initially developed with only state-level support,[35] the federal government quickly recognized its importance. In 1994, Congress passed the Violent Crime Control and Law

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[32] REMPEL ET AL., *supra* note 21, at x (reporting a 29% recidivism reduction over a three-year post-arrest period and an average 32% reduction over a one-year post-program period when compared with cases processed in conventional courts). *See also* Denise C. Gottfredson, Brook W. Kearley & Stacy S. Najaka, *Effectiveness of Drug Treatment Courts: Evidence From a Randomized Trial*, 2 CRIMINOLOGY AND PUB. POL'Y 171 (2003) (detecting significant reductions in recidivism over a two-year measurement period as a result of participation in the Baltimore City Treatment Court); Denise C. Gottfredson, Brook W. Kearley, Stacy S. Najaka & Carlos M. Rocha, *Baltimore City Drug Treatment Court: 3-Year Self-Report Outcome Study*, 29 EVAL. REV. 42 (2005) (three-year follow-up report).

[33] REMPEL ET AL., *supra* note 21, at xi.

[34] Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT. DRUG COURT INST. REV. 1, 30–31 (1998).

[35] *See* Goldkamp, *supra* note 12, at 4–5 (noting that most of the early drug courts did not receive federal funding); W. Clinton Terry, III, *Judicial Change and Dedicated Treatment Courts*, *in* THE EARLY DRUG COURTS, *supra* note 12, at 1, 9 (stating that "[s]ome of the early courts were entirely local in creation and funding.").

Enforcement Act,[36] calling for federal support for planning, implementing, and enhancing drug courts for nonviolent drug offenders. The U.S. Department of Justice's Bureau of Justice Assistance (BJA) Drug Court Discretionary Grant Program supports statewide drug court implementation and enhancement. In his 2007 budget, President Bush provided for $69 million to fund drug courts.[37]

Judicially-supervised drug treatment for drug possession offenders has received support from prosecutors, judges, defense attorneys, and federal and state governments.[38] With the support of the federal government, what began as a unique innovation in Miami has now spread to every state in the country.

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[36] Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

[37] BUDGET OF THE UNITED STATES GOVERNMENT 2007, 169. President Bush also requested more than seventy million dollars for drug courts for fiscal year 2006. BUDGET OF THE UNITED STATES GOVERNMENT 2006, 704, 706.

[38] *See* U.S. GOVERNMENT ACCOUNTING OFFICE, BRIEFING REPORT: DRUG COURTS: INFORMATION ON A NEW APPROACH TO ADDRESS DRUG-RELATED CRIME 15 (1995) (noting that drug courts require "a special collaborative effort among judges, prosecutors, defense attorneys, and related criminal justice agencies along with treatment providers and other social services and community organizations").

ARGUMENT

Expansion of the Term "Drug Trafficking Crime" to Include Non-trafficking Offenses Undermines Drug Courts' Ability to Serve Noncitizen Drug Possession Offenders And Will Lead To The Deportation Of Noncitizens Who Have Overcome Addiction Through Participation in Drug Courts

Respondent's interpretation of the term "drug trafficking crime" to include felony drug possession offenses threatens to undermine drug courts as an effective and cost-efficient means to address drug use by noncitizens and to positively impact immigrant families and communities. Respondent would require the deportation of successful graduates of drug court programs and undermine the incentive for noncitizens to participate in these programs.

A. Under Respondent's Proposed Rule, Immigration Judges Will Be Prohibited From Granting Relief To Noncitizens Who Have Successfully Completed Drug Treatment Programs

Virtually all noncitizens who participate successfully in drug court programs are deportable. The critical issue is whether the aggravated felony definition is read so broadly as to deny all noncitizen drug court participants any possibility of discretionary relief from deportation. Under Respondent's broad reading of the aggravated felony definition, immigration judges will be prohibited from granting relief to noncitizens who have successfully completed drug court programs.

For immigration purposes, a "conviction" is defined broadly as "a formal judgment of guilt of the alien entered

by a court" or, "if adjudication of guilt has been withheld, where:

> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[39]

Under this definition, courts have interpreted the provisional pleas often required for drug court participation, as binding convictions. Even in instances where a guilty plea was expunged or where formal adjudication was postponed pending the successful completion of a period of probation, as is the case with drug courts, the rule of the Board of Immigration Appeals, followed by all but one of the circuits that have addressed the issue, is that noncitizens are deemed to have been "convicted" for immigration purposes.[40]

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[39] 8 U.S.C. § 1101(a)(48)(A).

[40] *See, e.g., Acosta v. Ashcroft*, 341 F.3d 218, 225–26 (3d Cir. 2003) (following the "BIA's present interpretation of Section 101(a)(48)(A) . . . that state law charges of simple possession of a controlled substance that have been dismissed are a conviction for purposes of the INA"); *U.S. v. Anderson*, 328 F.3d 1326, 1328 (11th Cir. 2003) (holding that a plea of nolo contendere with adjudication withheld was a conviction within the meaning of Section 101(a)(48)(A)); *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812 (5th Cir. 2002), *amended by* 23 U.S. App. LEXIS 3629 (2003) (holding that a vacated federal conviction remains valid for immigration purposes); *U.S. v. Zamudio*, 314 F.3d 517, 521–22 (10th Cir. 2002) (holding that a "plea in abeyance," which required the defendant to pay a $1,000 fine over a six-month period, was a conviction within the meaning of Section 101(a)(48)(A)); *Herrera-Inirio v. INS*, 208 F.3d 299, 304 (1st Cir. 2000) (holding that a noncitizen's guilty plea and

(Continued on following page)

In addition to having a "conviction" for immigration purposes, noncitizens who complete drug court programs are deportable under the broad deportability grounds for drug offenses.[41] The question presented in this case is whether noncitizen drug possession offenders are also subject to being classified as having an "aggravated felony" conviction.

Congress has lessened the dramatic impact of the broad drug deportability grounds and the expansive definition of a "conviction" by allowing immigration judges to find that certain noncitizens with convictions are eligible for cancellation of removal, asylum, or other waivers if they can prove sufficient positive equities or threat of persecution upon deportation.[42] Noncitizen drug offenders therefore have a strong incentive to complete

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completion of probation, followed by a judgment of exoneration, was a conviction within the meaning of Section 101(a)(48)(A)); *U.S. v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999) (holding that a conviction for possession of a controlled substance, vacated after service of probation, was a conviction within the meaning of Section 101(a)(48)(A)). *Cf. Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that noncitizen first-time simple drug possession offenders who were no longer deemed to have been "convicted" under state law because they had complied with state rehabilitative statutes were not subject to deportation for those offenses because their offenses would have qualified for treatment under the Federal First Offender Act).

[41] 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."). *See also* 8 U.S.C. § 1227(a)(2)B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

[42] *See* 8 U.S.C. § 1229b(a) (listing requirements for cancellation of removal); 8 U.S.C. § 1158 (listing requirements for asylum claims); 8 U.S.C. § 1182(h) (listing requirements for family hardship waivers).

drug treatment. Beyond avoiding a felony conviction, noncitizens' successful completion of rehabilitation programs leaves open the possibility of obtaining discretionary relief by showing an immigration judge that they have overcome their addictions and deserve to remain in the United States with their families. Under Respondent's interpretation drug court dispositions—like all felony possession convictions—would become aggravated felonies, and noncitizens who have successfully completed drug court programs would be subject to mandatory deportation with no possibility of discretionary relief.

Furthermore, including possession offenses—and therefore drug court dispositions—in the definition of "drug trafficking crime" would lead to the denial of naturalization and mandatory deportation for noncitizens who have already successfully completed drug court programs. The application for naturalization requires applicants to state whether they have ever been "placed in an alternative sentencing or rehabilitative program (for example: diversion, deferred prosecution, withheld adjudication, deferred adjudication)."[43] This question elicits information about dispositions such as those provided by drug courts. If this Court adopts Respondent's interpretation of the aggravated felony definition, longtime legal permanent residents, including veterans and those with U.S. citizen family members, who have successfully completed drug treatment will face not only automatic denial of their citizenship application but will also be subject to referral

[43] United States Citizenship and Immigration Services, Department of Homeland Security, N-400 Application for Naturalization (2005), *available at* http://www.uscis.gov/graphics/formsfee/forms/files/N-400.pdf.

for mandatory deportation. Respondent would bind the hands of immigration judges, mandating that noncitizens who have overcome their addictions as a result of drug treatment courts be deported.

Consider an example of a lawful permanent resident living in Texas.[44] This individual has lawfully resided in the United States for more than two decades and has a U.S. citizen wife and child. In 1993, when he was nineteen-years-old, he was charged with his first and only offense: felony possession of marijuana. Instead of prosecuting him in criminal court, as a condition of his bond he was sent to drug court where he made factual admissions and was assigned to a one-year drug treatment program. Indictment, conviction, and formal adjudication were deferred and, upon his successful completion of the program, the charges were dropped. As a result of his participation in the program, this individual has remained drug free for over twelve years.

Under Texas's interpretation of the aggravated felony rule, and under the rule argued for by Respondent, this individual would be classified as an aggravated felon and would be subject to mandatory deportation. An immigration judge hearing the case would be prohibited from considering positive equities such as the length of the individual's time in the United States, the hardship that his departure would cause his U.S. citizen family members, and the fact that the predicate charges were dropped upon his successful completion of the drug treatment program. If the Court adopts Respondent's proposed

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[44] This example is a composite that is representative of those who are affected by a broad reading of the aggravated felony definition.

definition of the term "drug trafficking crime," which includes state-level possession offenses, both past and present noncitizen participants in drug courts who have been granted similar conditional discharges will be subject to mandatory deportation.

B. Adoption Of Respondent's Interpretation Of The Term "Drug Trafficking Crime" Will Render Drug Courts Ineffective As A Tool To Address Noncitizen Drug Use and Drug-Related Crime, Thereby Negatively Impacting Children, Families, And Communities

By making it difficult, if not impossible, for drug courts to serve noncitizen offenders, Respondent's interpretation of the aggravated felony definition would conflict with federal policy supporting the use of drug courts. Drug courts currently offer both citizens and noncitizens a "carrot" (a vacated, expunged, or reduced conviction) and a "stick" (jail time or other punishment, and a conviction on one's record) to motivate compliance with drug treatment and avoidance of criminal behavior. For noncitizens, Respondent's definition of "drug trafficking crime" removes the "carrot" of eligibility for discretionary relief from deportation, leaving only the "stick" of punishment. If noncitizens participate in drug court programs, they will be subject to mandatory deportation, regardless of whether they succeed or fail in drug treatment. Given the federal government's ongoing support for drug courts as "an effective and cost efficient way to help non-violent drug offenders,"[45] and the widespread recognition that

[45] PRESIDENT GEORGE W. BUSH, *supra* note 8, at 66 (2001).

court-supervised drug rehabilitation improves public safety, this Court should avoid an interpretation of the term "drug trafficking crime" that reduces drug courts' ability to serve noncitizen communities.

A central component for drug courts' success is their ability to wield the coercive power of the criminal justice system. Drug possession offenders are offered a series of incentives to comply with the program's requirements. Successful noncitizen drug court participants emerge from the programs rehabilitated, they are able to avoid jail time and remain with their family, they may build positive equities to fight deportation, and they avoid a felony conviction on their criminal records. If drug possession is considered an aggravated felony, then the coercive incentive system that ensures drug courts' effectiveness is dramatically undermined. Regardless of their successful completion of a drug court program, their rehabilitation, or the fact that there is no criminal law felony conviction on their record, noncitizens who participate in drug courts will be subject to mandatory deportation. There is no opportunity to retain family unity; an immigration judge is prohibited from granting discretionary relief and considering positive equities.

Drug courts provide a valuable rehabilitative service to participants, their communities, and their families. Currently, drug courts regularly open their doors to lawful permanent residents charged with drug possession offenses. Like other graduates of drug court programs, many of these people manage to overcome their addictions and lead sober, law-abiding lives. Provided that over five years have passed since the offense, noncitizens who successfully complete drug court programs may be granted U.S. citizenship. Under Respondent's interpretation, however,

legal permanent residents with drug court dispositions who apply for citizenship will not only be rendered permanently ineligible to naturalize, they will also face referral for mandatory deportation when they state on their application that they have received a non-conviction court disposition for a drug offense.

Because the effects of drug addiction reach beyond individual drug users, drug courts are an important means by which the criminal justice system can benefit the families and communities of noncitizen drug offenders as well. By promoting sobriety and law-abiding behavior, drug courts have the potential to strengthen families and make a profound impact on the health of our society as a whole. Nearly two-thirds of drug court participants are parents.[46] Many noncitizen drug offenders have U.S. citizen children and/or spouses whose lives are immeasurably changed for the better when their noncitizen family member completes drug treatment and overcomes his substance abuse problem. Drug courts provide a strong incentive for noncitizens with substance abuse issues to complete a rigorous rehabilitation program, and therefore serve the interests of U.S. citizen children and other family members affected by addiction as well as reducing pressure on the child welfare and family court systems.

By turning felony drug court dispositions into aggravated felonies, Respondent's overly broad interpretation of the term "drug trafficking crime" threatens to undermine not only drug courts' positive impact on individual

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[46] DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS 8 (1998).

noncitizen drug possession offenders, but upon their families and communities as well. The participation of noncitizen drug court participants will decrease and legal permanent residents who completed drug court programs years ago will be subject to mandatory deportation. In addition to removing the coercive incentive system central to drug courts' success, mandatory deportation of those with felony drug court dispositions will result in fear of participation in drug courts in immigrant communities, making it even more difficult for drug courts to serve as a tool to address substance abuse issues in those communities. Expansion of the term "drug trafficking crime" to include non-trafficking possession offenses will therefore dramatically curtail the ability of state criminal justice systems to channel noncitizen offenders into treatment programs and will unfairly punish noncitizens who have successfully completed drug treatment and now lead healthy, stable lives.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision from the United States Courts of Appeals from the Eighth Circuit be reversed.

Respectfully submitted,

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JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FORMER GENERAL COUNSELS OF THE IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSE ANTONIO LOPEZ

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QUESTION PRESENTED

Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

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IN THE

Supreme Court of the United States

No. 05-547

JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FORMER GENERAL COUNSELS OF THE IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSE ANTONIO LOPEZ

INTERESTS OF *AMICI CURIAE*

This brief is submitted on behalf of *amici* Owen B. Cooper, David A. Martin and Paul W. Virtue (the "*amici*"), pursuant to Rule 37 of the Rules of this Court, with the written consent of both petitioner and respondent, whose consent letters have been filed with the Clerk of Court.[1]

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Each of the *amici* served as General Counsel of the Immigration and Naturalization Service ("INS"). In that capacity, *amici* were responsible for the INS legal proceedings program, and supervised the hundreds of INS attorneys who represented the government in removal proceedings in the immigration courts nationwide. In addition, *amici* were responsible for advising the Attorney General, the Commissioner of the INS, and the INS's operational and policy components on all aspects of the Immigration and Nationality Act ("INA").[2] Owen B. Cooper served as General Counsel from October 1999 to February 2003, and is currently Of Counsel in the Washington, D.C. office of Paul, Hastings, Janofsky & Walker LLP. David A. Martin served as General Counsel from August 1995 to January 1998, and is currently the Warner-Booker Distinguished Professor of International Law and Class of 1963 Research Professor at the University of Virginia. Paul W. Virtue served as Deputy General Counsel from November 1988 to January 1997, as Acting Executive Associate Commissioner for Programs from January 1997 to February 1998, and as General Counsel from March 1998 to May 1999, and is currently a Partner with the Washington, D.C. office of Hogan & Hartson, L.L.P.

Amici strongly support enforcement of this country's immigration laws and worked diligently throughout their government service to improve the government's practices regarding the removal of aliens with criminal records from the United States. In this brief, *amici*, from their unique perspective as former senior officials responsible for the enforcement of the immigration laws, offer the Court insights into the considera-

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[2] As part of the Homeland Security Act of 2002 [*hereinafter* "HSA"], Pub. L. No. 107-296, 116 Stat. 2135, Congress created the Department of Homeland Security ("DHS"), abolished the INS, and transferred the functions of the INS to DHS. HSA at § 471(a), 116 Stat. 2135, 2205. The transfer took effect on March 1, 2003, and the immigration law and policy functions for which *amici* were responsible are now carried out by DHS.

tions that inform the conduct of removal proceedings; the centrality of individualized decision making to the effective administration of the immigration laws; the consequences of the Congressional decision to restrict individualized decision-making where an alien is alleged to have committed an "aggravated felony"; and the practical and legal significance of an unnecessarily expansive reading of the "aggravated felony" definition. *Amici* leave to others a detailed examination of the proper application of the aggravated felony drug trafficking category to particular state dispositions of drug possession offenses.

SUMMARY OF ARGUMENT

Sound enforcement of the immigration laws requires processes that take individual circumstances into account regarding an alien's admissibility into or deportation from the United States. In the normal course of events, individual circumstances are considered through the Congressionally mandated two-step removal proceeding in immigration court. In the first step, the immigration court, acting on allegations by the government, determines whether a person is subject to removal on the basis of the statutory grounds, *e.g.*, for having remained beyond the period of admission, for violating the terms of admission, or for having been convicted of certain categories of crimes. Once it is determined that the person is subject to removal, the immigration court ordinarily then considers whether the person qualifies for and should be granted relief from removal. Such relief may be granted, for example, where the enforced departure could result in persecution of the person by others, where a person's long residence justifies continued permission to remain lawfully in the country, or where the person may qualify for citizenship through naturalization. The immigration court, on the basis of the person's individual circumstances, may grant relief from removal despite a determination that a basis for removal exists.

Issues of relief from removal typically arise only once the case has reached the immigration courts and a determination has been made that the person is subject to removal. This consideration of the individual circumstances is a central aspect of the effective administration of the immigration laws, especially given the intricate combinations of circumstances and equities that such cases inevitably present. Removal obviously can have significant personal, indeed life-threatening, effects, as well as effects on family and society. A foreign national might face political, religious, or other persecution if deported, or a person may be eligible, if removal proceedings are terminated, to pursue naturalization and become a United States citizen. The removal proceeding in immigration court is the central, and often the only, forum in which careful decisions on these weighty issues can be made. It is the forum in which a detailed analysis of the individual circumstances of a case is best undertaken, and in which representatives of DHS can assist the immigration court in testing the credibility and qualifications of the alien who is subject to removal proceedings, and make recommendations as to whether removal or relief is the appropriate outcome.

In recent decades, Congress determined that some conduct was so egregious that it would justify denying the ordinary discretionary consideration of relief, and in those cases restricted or eliminated the second stage of the removal process. To define this conduct, Congress designated certain categories of crimes as "aggravated felonies." *Amici* acknowledge the clear authority of Congress to designate such offenses, and to make the decision that convictions for such crimes should trigger an exception from the normal process in immigration court and bar most or all avenues of relief. Nor do *amici* argue here that Congress improperly chose specific crimes to include within the "aggravated felony" definition in the INA. Rather, because the "aggravated felony" categorization has such sweeping consequences, and essentially

eliminates the capacity of the immigration enforcement system to differentiate among individual circumstances, *amici* urge that this Court assure that the categorical exclusion applies only where Congress has clearly and unequivocally decided to treat a specific type of conviction as an aggravated felony. Absent such a clear statement, the courts should treat crimes as outside of the "aggravated felony" definition, so that the immigration system remains open to consider the normally available forms of relief from removal. This interpretation of the "aggravated felony" definition would not obstruct the power of the government to enforce the removal of criminal aliens where appropriate. Most foreign nationals with criminal convictions that fall outside that definition would still be removable based on the crime, and ample authority exists to permit the government's attorneys to argue for a discretionary denial of relief when appropriate. Such an interpretation would protect the capacity of the removal system, and the immigration judges, DHS attorneys, and other officials participating in the removal process, to make individualized decisions in all but the cases in which Congress has clearly called categorically for removal.

ARGUMENT

I. THE REMOVAL PROCESS NORMALLY, AND CRITICALLY, IS PREMISED UPON INDIVIDUALIZED DECISIONS ABOUT BOTH WHETHER AN ALIEN IS REMOVABLE AND WHETHER PARTICULAR CIRCUMSTANCES WARRANT RELIEF FROM REMOVAL

The removal process begins when DHS issues a Notice to Appear ("NTA") charging an alien with any applicable ground of deportability or inadmissibility under the INA.[3] The pro-

[3] INA §§ 239-40, 8 U.S.C. §§ 1229, 1229a.

ceedings take place before an immigration judge.[4] The NTA is not itself an order of removal. Instead, it initiates a determination by an immigration judge as to whether the charged ground renders the alien removable from the United States.

Once removability is charged or established, however, the immigration laws allow specific exceptions to delay or even obviate removal. These exceptions from removal, even for those who are removable under the law, provide an essential mechanism to consider and realize parallel policy goals of the INA in appropriate cases.

The law of asylum, for example, permits persons fleeing persecution to obtain refuge in this country and later apply for permanent status.[5] Withholding of removal provides a similar, but more limited means, to avoid the removal of an alien to a territory where his life or freedom would be threatened without granting asylum as such.[6] Cancellation of removal allows lawful permanent residents who have resided in the United States for an extended period to obtain a weighing of the equities for and against permanent removal.[7] Termination of a case in immigration court in order to permit processing by DHS of a citizenship application allows those who, *prima facie*, meet the requirements for citizenship (principally, a minimum of five years in the United States since being admitted as a lawful permanent resident) to apply for naturalization and obtain a full determination of their eligibility.[8] Certain waivers of inadmissibility can be available in depor-

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[4] Both before and after enactment of the HSA, the immigration court process is administered by the Executive Office for Immigration Review ("EOIR"), which is housed within the Department of Justice. HSA at § 1101; 6 U.S.C. § 521(a).

[5] INA § 208, 8 U.S.C. § 1158.

[6] INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

[7] INA § 240A(a), 8 U.S.C. § 1229b(a).

[8] 8 C.F.R. § 1239.2(f).

tation proceedings, for example, where deportation would result in extreme hardship to a qualifying family member who is a citizen or permanent resident of the United States.[9] Voluntary departure provides those who must leave the country with a stated period to tie up their affairs and pay their own way to depart.[10]

The removal proceeding typically is the sole process in which facts can be considered in light of these distinctive policy goals that contemplate removal and relief from removal. The proceeding affords an opportunity for the alien to respond to the allegations of removability in the NTA, and to raise specific bases upon which removal might be cancelled, limited, or even obviated by naturalization. In this context, the DHS counsel has the opportunity—otherwise missing, since it is not a part of the information that goes into the decision to issue an NTA—to see, test, evaluate, and express positions to the court on such information. On the basis of this process, and of the judge's own fact-finding activities, the immigration judge can reach a deliberate, fully informed decision whether to order removal.

II. WHERE A CONVICTION IS CLASSIFIED AS AN AGGRAVATED FELONY, INDIVIDUALIZED DETERMINATIONS OF RELIEF FROM REMOVAL ARE GENERALLY PRECLUDED

Beginning in 1988,[11] Congress passed a series of amendments to the INA to limit the eligibility of those convicted of

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[9] INA § 212(h), 8 U.S.C. § 1182(h).

[10] INA § 240B, 8 U.S.C. § 1229c.

[11] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

serious criminal offenses for certain immigration benefits. Under these changes, those found guilty of "aggravated felonies" became subject to removal on this new and separate basis (though nearly all were already removable on other grounds, such as conviction of a controlled substance offense or of a crime involving moral turpitude).[12] More importantly, the aggravated felony provisions rendered such persons ineligible for certain immigration benefits such as asylum and naturalization, and ineligible to seek or be granted certain discretionary remedies, such as cancellation of removal or voluntary departure. Congress has expanded the list of aggravated felonies in successive amendments of the INA.[13]

In creating the "aggravated felony" category, Congress determined that some conduct was so antithetical to the basis on which an alien could seek to obtain or retain residence rights, much less progress toward citizenship, that persons guilty of such conduct should not only be subject to removal, but should have no ability to present factors weighing against removal. That is certainly a choice within the Congressional power, and it is a choice that *amici* sought to enforce during their terms in office. *Amici* also agree with the basic underlying policy reflected in the statutory architecture—to impose a bright-line rule limiting the issues that may be litigated by removal respondents who have been convicted of unquestionably serious offenses. Although we recognize that there are many legitimate arguments that Congress may, as a matter of policy, have unwisely expanded the list of aggravated felonies beyond those clearly appropriate, we do not question here the list that Congress has adopted. Rather, in this brief, we urge the Court to adopt a narrow approach in interpreting the reach of that list in order to best fulfill the

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[12] *See, e.g.*, INA § 237(a)(2)(A)(i), (B)(i), 8 U.S.C. § 1227(a)(2)(A)(i), (B)(i).

[13] The current definition is at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

overall Congressional intent as to general immigration policy and the proper functioning of the immigration system.

A foreign national's conviction of an offense properly found to be within the "aggravated felony" category eliminates the capacity of the immigration process to consider any of the avenues of relief described above.[14] Because the consequences of this label are therefore so severe, the Court should give careful consideration to this practical impact when deciding whether Congress clearly intended for certain conduct to fall within the "aggravated felony" definition.

While Congress certainly identified some criminal conduct as deserving of a bar to equitable consideration of other factors, a far broader range of criminal offenses can trigger

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[14] An alien that has been convicted of a "particularly serious crime" that "constitutes a danger to the community of the United States" is barred from seeking asylum. Under the asylum provisions, an aggravated felony is a particularly serious crime. INA §§ 208(b)(2)(A)(ii), 208(b)(2)(B)(i), 8 USC § 1158(b)(2)(A)(ii), 8 USC § 1158(b)(2)(B)(i). For withholding of removal claims, aggravated felony convictions that involve a sentence of more than 5 years are to be considered particularly serious crimes and therefore act as an automatic bar to withholding for removal claims. INA § 241(b)(3); 8 U.S.C. § 1231(b)(3)(B). Notwithstanding this length of sentence threshold, the Attorney General in *In re Y-L., In re A-G, and In re R-S-R-*, 23 I. & N. Dec. 270 (BIA 2002), determined that drug trafficking offenses are presumed to be *per se* "particularly serious crimes" unless specially enumerated "extraordinary and compelling circumstances" are shown. For naturalization purposes, aggravated felons are, by definition, unable to demonstrate that they have the good moral character required for grants of citizenship. INA § 101(f)(8); 8 U.S.C. § 1101(f)(8). Aliens who have been convicted of an aggravated felony are ineligible for cancellation of removal. INA § 240A (a)(3); 8 U.S.C. § 1229b(a)(3). Aliens who have been convicted of an aggravated felony are also not eligible for § 212(h) relief. 8 U.S.C. § 1182(h); *In re Yeung*, 21 I. & N. Dec. 610 (BIA 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639. Aliens who are convicted of an aggravated felony are not eligible for grants of voluntary departure. INA § 240, 8 USC § 1229a.

removability, independent of the "aggravated felony" label and the resulting bars. With respect to drug offenses, for example, the government has wide powers to charge an alien having a drug conviction with deportability. Section 237(a)(2)(B) of the INA, 8 U.S.C. § 1227(a)(2)(B), provides that all drug convictions, other than a single conviction for possession of less than 30 grams of marijuana, are grounds of deportability. In addition, INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), defines "conviction" broadly to include many dispositions that would not constitute a "conviction" under state law.[15] As a result, an expansive application of the aggravated felony definition is completely unnecessary to enhance the ability of the government to charge an alien with deportability and to enforce the removal of persons who have committed such crimes.

III. ADMINISTRATIVE AND LOWER COURT DECISIONS HAVE CREATED CONFUSION CONCERNING THE AGGRAVATED FELONY CATEGORY AND IMPROPERLY BROADENED ITS REACH

The particular issues in this case arose in an environment where the agency and the courts vacillated in interpreting the appropriate reach of the "drug trafficking" aggravated felony definition to state drug possession convictions.[16] In the years

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[15] Under these provisions state court dispositions that are not convictions under state law, such as deferred adjudications, are nonetheless treated as convictions under immigration law.

[16] Agency interpretations have shifted over time. *Compare In re Davis*, 20 I. & N. Dec. 536 (BIA 1992) (holding that a state misdemeanor conviction for conspiracy to distribute a controlled substance is analogous to illicit trafficking in controlled substances and therefore qualifies as an aggravated felony), *with In re K-V-D-*, 22 I. & N. Dec. 1163 (BIA 1999) (holding that a Texas state felony conviction for possession of a controlled substance, which was a felony under Texas law but would be a misdemeanor under federal law, is not an aggravated felony conviction), *and In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002) (rejecting *In re K-V-D-*

prior to 1996, attention focused on aliens with serious criminal sentences who sought to obtain relief from deportation despite lengthy prison terms. Then, the primary role of the aggravated felony drug trafficking definition was to preclude relief for those who committed criminal acts that judges found serious enough to warrant a sentence of five years or more in prison.[17] But in the years since 1996, prison sentences no longer play a direct role in determining eligibility for relief. Increasingly, the aggravated felony label itself, whether or not any significant jail time has been imposed, serves as the sole determinant of eligibility for relief.[18] The

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and holding that the rule adopted by the majority of circuit courts should apply in the absence of a specific and controlling circuit court rule). Of course, the federal circuits differ too in their application of aggravated felony definition. Courts in the Second, Third, Sixth, Ninth, Fifth, and Eighth Circuits have addressed the issue of whether certain state-law drug offenses are drug trafficking crimes and thus aggravated felonies. The Second Circuit, *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996), Third Circuit, *Gerbier v. Holmes*, 280 F.3d 297, 312 (3d Cir. 2002), Sixth Circuit, *United States v. Palacios-Suarez*, 418 F.3d 692, 697 (6th Cir. 2005), and Ninth Circuit, *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004), have concluded that drug related offenses that do not contain a trafficking element are not drug trafficking crimes, while the Fifth Circuit, *United States v. Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001), and Eighth Circuit, in this case, has concluded that state-law drug offenses that do not contain a trafficking element, but which are considered felonies under state law, are drug trafficking crimes even when these crimes are not felonies under federal law.

[17] Under former INA §212(c), a lawful permanent resident with an aggravated felony conviction who had served five years in prison was ineligible for that particular form of relief from deportation. Cases about the reach of the aggravated felony definition, therefore, typically involved people whose convictions resulted in at least a five year sentence of imprisonment.

[18] *See, e.g., Salazar-Regino v. Trominski*, 415 F.3d 436, 448 (5th Cir. 2005) *petition for cert. filed*, 74 U.S.L.W. 3395 (U.S. Dec. 22, 2005) (No. 05-830) (holding that a state felony drug possession case that resulted in a deferred adjudication was an aggravated felony conviction for removal purposes).

issues here are whether and how the categorical exclusion should be applied to low level felonies or state misdemeanors that may involve little or no prison term. *Amici* urge the Court to approach these issues carefully, and mindful of the purpose of the aggravated felony definition and its functional role in the statutory scheme for determining the appropriate resolution of asylum, citizenship, deportation and relief matters.

As emphasized above, properly applied, the aggravated felony definition serves a useful role in reaching a prompt resolution in cases where the balancing of equities would almost certainly result in denial of discretionary relief. However, the variation in state criminal justice systems creates the very real danger that the process of matching the federal definition to state convictions will operate to prevent consideration of relief where relief would otherwise be appropriate.

This danger is all the greater when the aggravated felony categories are read expansively. The laws of South Dakota, which are at issue in this case, provide a good illustration. South Dakota punishes almost all drug possession convictions as felonies. If all of South Dakota's drug felonies were presumed to be aggravated felonies for federal immigration law purposes, only a very small number of persons with South Dakota drug convictions—namely those with a conviction for between one and two ounces of marijuana—would fit in the gap between the deportability grounds and the aggravated felony label and so could ask an immigration judge to consider a discretionary grant of relief from removal. Predictably, this would lead to many cases in which an assessment of the relevant equities, as considered in equivalent cases involving convictions in other jurisdictions, might weigh strongly against deportation, but the immigration court would be precluded from awarding relief, or even gathering and considering information relevant to such equities. An appropriately tailored reading of the aggravated felony category, in contrast, would

preserve the ability of DHS and the immigration courts to consider the nature of a particular crime rather than simply the jurisdiction in which it was committed.

IV. AN IMPROPERLY BROAD READING OF THE AGGRAVATED FELONY CATEGORY INTERFERES WITH THE EXERCISE OF SOUND PROSECUTORIAL AND ADJUDICATORY JUDGMENT IN REMOVAL PROCEEDINGS

In addition to providing for flexibility in the enforcement of the immigration laws, statutory forms of relief from removal provide government counsel with an invaluable—and often the only real—opportunity to exercise their discretion based on an evaluation of the evidence. In the removal proceeding, but only in that proceeding, DHS counsel can review the documents that support relief, test the credibility of witnesses, evaluate the underlying facts of the case and make judgments that go beyond the label applied to a conviction. Likewise, and at any stage in the administrative process, government counsel generally has the option to agree to a form of relief or to waive appeal. When the aggravated felony label is applied to a conviction, however, trial counsel has no opportunity to consider arguments by or on behalf of a respondent for appropriate relief. Instead, the only alternative to removal is declining to commence removal proceedings without ever having had a chance to test in court the quality of the claim for relief. From a law enforcement standpoint, that Hobson's choice is no substitute for full consideration on the merits.

A. The Cancellation Process Example

A brief summary of the cancellation of removal ("cancellation") process, as applied to aliens who had been admitted as lawful permanent residents but are now deportable (primarily because of a criminal conviction) demonstrates the role and value of relief mechanisms in the effective administration of

the law. By statute, cancellation is available only to persons who have been lawful permanent residents for five years,[19] and who have accrued at least seven years of residence after admission (in any status) prior to the commission of the offense that leads to a conviction.[20] Even then, cancellation depends on a showing that removal is contrary to the "interest of the United States."[21] This judgment is based on facts adduced in the specific case, such as rehabilitation, military service to the United States, strong ties to this country, and weak ties to the country of origin.

An applicant for cancellation of removal bears the burden of proving that he or she is eligible for and deserving of relief. The alien will normally testify about the actual circumstances behind a conviction, which may involve conduct for which the person was not convicted. Any claims of rehabilitation must also be supported by testimony and documentary evidence that demonstrates the validity of the claim.

At the cancellation hearing, government counsel tests the credibility of the applicant for relief and the depth of the evidence of rehabilitation through cross-examination and through evidence such as the individual's criminal history, if it extends beyond the charged ground of deportability. The court proceeding also provides an opportunity to test the strength of equitable factors, such as family ties, service in the armed forces of the United States, and lack of ties to the country of origin.

This process contemplates a structured inquiry into the equities that support relief from removal. It is analogous to a sentencing hearing in which the judge considers the evidence

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[19] INA § 240A(a)(1), 8 U.S.C. § 1229b(d).

[20] INA § 240A(a)(2) & (d), 8 U.S.C. § 1229b(a)(2) & (d).

[21] *In re C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998) (incorporating standard for evaluating claims for relief from *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978)).

and analyzes the factors that may warrant a lesser penalty in the individual case.

If cancellation is granted, it serves as the functional equivalent of a grant of probation. The past conviction is excused, and the person's lawful status restored, yet enforcement safeguards remain. By statute, the alien is barred from any future grant of cancellation.[22] Thus, if a lawful permanent resident with a grant of cancellation is thereafter convicted of a deportable crime, he or she can no longer seek cancellation.

B. Exercise of Discretion

If the DHS representative is satisfied at any point in the hearing that the applicant has made out a case for relief, the agency may choose not to oppose a grant of cancellation. In such a case, if the judge is satisfied that relief is appropriate, the judge may issue a short decision indicating that neither side will appeal. Similarly, even without an earlier statement that the government will not oppose relief, if the government attorney is persuaded that the judge has reached an appropriate decision in granting cancellation relief, the government can choose not to appeal.

Thus, at each stage, the cancellation process provides government counsel with valuable tools to make a sound judgment whether to pursue removal or allow the individual one last chance to remain as a lawful permanent resident in the United States.

The flexibility offered in the cancellation context extends to other forms of relief. An award of voluntary departure, for example, eases the burden on enforcement resources, but persons with aggravated felony convictions are ineligible. Similarly, in appropriate cases, government counsel may agree to termination of a removal case in order to allow the individual to pursue citizenship. The termination process allows the

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[22] INA § 240A(c)(6), 8 U.S.C. § 1229b(c)(6).

DHS representative to send the case for further development to DHS adjudicators who will investigate and make a full determination of the individual's good moral character and other qualifications for citizenship. The aggravated felony label, however, prevents a DHS attorney from agreeing to proceed in this manner and having citizenship examiners evaluate the evidence of eligibility.

Likewise, unnecessarily expansive applications of the aggravated felony category burden the removal process with cases that could be resolved by the Citizenship and Immigration Services ("CIS") bureau of DHS. When a person applies for asylum, for example, trained CIS personnel in an asylum office can evaluate the evidence of persecution and will consider discretionary factors in determining whether to grant asylum. Conviction of a serious crime, when viewed in full context, will ordinarily result in a discretionary denial of asylum. But if the crime is categorized as an aggravated felony, CIS lacks the discretion to even engage in such an analysis of all relevant factors.

Similarly, expansive application of the aggravated felony label ties the hands of citizenship examiners. An applicant for naturalization must demonstrate his or her good moral character during the five-year period immediately preceding the filing of the application. If the person has been convicted after 1990 of an aggravated felony, DHS cannot grant citizenship no matter how old the offense, regardless of how powerful the other evidence of current good moral character may be in any particular case.

In each of these situations, the procedures for evaluating evidence provide the expert agencies and their personnel with the necessary tools to decide whether a conviction for a crime that is outside the aggravated felony definition in fact warrants deportation, denial of asylum or denial of citizenship. But if the crime falls within the aggravated felony category, government counsel loses the ability to test the evidence and

adopt a position in the case that best meets the broader objectives of immigration enforcement policy.

V. THE RULE OF LENITY, LONG APPLIED IN DEPORTATION CASES, REINFORCES THE REASONS FOR APPLYING THE AGGRAVATED FELONY DEFINITION ONLY WHERE CONGRESS GAVE A CLEAR INDICATION THAT IT SHOULD APPLY

The rule of lenity, disfavoring severe readings of removal grounds absent a clear statement from Congress, is a long-standing and widely applied principle in immigration cases.[23]

The Court in *Fong Haw Tan* said:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.[24]

Courts generally apply the rule of lenity in the immigration context when there is an ambiguity about whether deportation provisions should apply to the petitioner.[25] There is no clear

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[23] *See Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Costello v. INS*, 376 U.S. 120, 128 (1964); *United States v. Phommachanh*, 91 F.3d 1383, 1385 (10th Cir. 1996); *Barrese v. Ryan*, 203 F.Supp. 880, 887 (D. Conn. 1962).

[24] *Fong Haw Tan*, 333 U.S. at 10.

[25] *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

indication that Congress intended the definition of aggravated felony to apply to drug offenses that are felonies under state law, but would be misdemeanors under the federal law, and, as shown above, the consequences are severe if the definition is applied in such a way. The Court should ensure that ambiguous elements in the aggravated felony definition are not interpreted as to hamper the functionally useful capacity of the removal process to make individualized decisions regarding removal and relief.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should reverse the judgment of the circuit court.

Respectfully submitted,

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UNITED STATES OF AMERICA, RESPONDENT

On Writ Of Certiorari To The United States Court of Appeals for the Eighth and Fifth Circuits

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BRIEF FOR HUMAN RIGHTS FIRST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the term "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(B) encompasses a state felony conviction for simple possession of a controlled substance.

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INTRODUCTION

Human Rights First, as *amicus curiae*,[1] submits this brief to alert the Court of the impact its decision may have on refugees and on this Nation's compliance with its international treaty obligations concerning refugees.

Under U.S. law, a refugee who is convicted of an "aggravated felony" is automatically barred from receiving asylum. Such a conviction is also a presumptive bar to "withholding of removal" – the form of protection granted to a refugee if there is a clear probability that her life or freedom would be at risk if she returned to her home country.

If the Government's position in this case is adopted, refugees who have fled political and religious persecution can be returned to nations where their lives and freedom are threatened, on the basis of a single state conviction for simple drug possession with no proof at all of an intent to engage in illicit drug trafficking. This is not what Congress intended. Indeed, to accept the Government's position would risk putting this Nation in violation of the Protocol Relating to the Status of Refugees, under which it agreed that it would not return a refugee to persecution as a consequence of her criminal conduct in this country unless she were convicted of a "particularly serious crime" and thus presented a danger to the community. This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of the law of nations, unless the language of the statute unambiguously compels such a result. See *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The treaty

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel has made a monetary contribution to the preparation or filing of this brief.

obligations discussed herein provide an additional reason to reject the Fifth and Eighth Circuits' reading of the statutes at issue, even assuming that their reading is permissible under those statutes.

INTEREST OF *AMICUS CURIAE*

Since 1978, Human Rights First (formerly known as the Lawyers Committee for Human Rights) has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum.

Human Rights First grounds its refugee protection work in the standards set out in the 1951 Convention Relating to the Status of Refugees (the "Convention") and the 1967 Protocol Relating to the Status of Refugees (the "Protocol"), as well as other international human rights instruments. Human Rights First advocates that U.S. law and policy adhere to the standards set forth in these agreements.

Human Rights First operates one of the largest pro bono asylum representation programs in the country. With the assistance of volunteer attorneys, Human Rights First provides legal representation without charge to hundreds of indigent asylum applicants. Human Rights First has also conducted research, convened legal experts, and provided guidance to assist in the development of effective and fair methods for excluding from refugee protection those who are not entitled to the protection of the Convention and Protocol. See, *e.g.*, HUMAN RIGHTS FIRST, REFUGEES, REBELS & THE QUEST FOR JUSTICE (2002).

In order to protect the rights of the refugees it assists and to ensure that the protections guaranteed to them under the Convention and the Protocol remain available to refugees in the United States generally, Human Rights First addresses legal developments that would lead the United States to return refugees to persecution even though they are entitled

to protection as a result of the U.S.'s commitment to abide by these treaty obligations. Thus Human Rights First has a profound interest in the outcome of these cases.

Given Human Rights First's experience and perspective in this important area of law, it is uniquely well situated to assist the Court in understanding the relationship between the question presented here and the laws governing asylum and refugees, as well as the risk that the Fifth and Eighth Circuits' analysis poses to the United States' compliance with its international legal obligations arising under the Protocol and Convention.

STATEMENT

The cases before the Court concern the proper interpretation of the term "aggravated felony" as defined in the Immigration and Nationality Act ("INA"). As discussed further below, the Court's resolution of that question will have serious implications for some refugees because of how that term is incorporated into the statutes involving asylum and "withholding of removal."

The INA defines the term "aggravated felony" as including

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code)

8 U.S.C. § 1101(a)(43)(B).[2] The term "aggravated felony" applies to an offense "whether in violation of Federal or State law." *Id.* § 1101(a)(43).

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[2] Section 102 of the Controlled Substances Act defines "controlled substance" in a manner not relevant here; it does not define the term "illicit trafficking." See 21 U.S.C. § 802.

Section 924(c)(2) of Title 18 in turn defines a "drug trafficking crime" as

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2). For the parties in the instant cases, the most relevant clause in this statute is the first one: "any felony punishable under the Controlled Substances Act." *Id.*

In the decisions under review, the Fifth and Eighth Circuits have interpreted this statutory scheme to mean that the category of "aggravated felonies" includes a state felony conviction for mere possession of a controlled substance—a crime that includes no element of "illicit trafficking" and that would generally be punished only as a misdemeanor under federal law. Thus those courts (as well as the Government) understand "any felony punishable under the Controlled Substances Act" to include "any ***state*** felony punishable under the Controlled Substances Act ***even as a misdemeanor.***"

Among other things, this interpretation ignores the fact that Congress referred to "drug trafficking" crimes under Section 924(c) as a subset of "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). Thus, quite sensibly, Congress did ***not*** intend to include all drug-related offenses, however minor, in its definition of "aggravated felony," but instead focused on offenses that actually involve the sale or distribution of controlled substances. A state conviction for simple possession does not fit within this definition. As described further below, the interplay between these statutes and the Protocol supports a narrow reading of the statutory definition of "aggravated felony."

SUMMARY OF ARGUMENT

The definition of the term "aggravated felony" has important implications in the context of asylum, separate and apart from its implications for "cancellation of removal" (*Lopez*) and sentencing (*Toledo-Flores*). A refugee who has been convicted of an "aggravated felony" in the United States is automatically ineligible for asylum, without exception. 8 U.S.C. § 1158(b)(2)(B)(i). Additionally, an asylum applicant or other immigrant who has been convicted of an "aggravated felony" is presumptively ineligible for "withholding of removal"—the relief granted to a refugee if her life or freedom would be threatened if she were to be returned to her country of nationality. 8 U.S.C. § 1231(b)(3). And if the refugee received a sentence of five years or longer for the crime—even if it was a suspended sentence—the bar to "withholding of removal" becomes absolute. *Id.*

This issue has grave implications for this Nation's commitment to protect those who have fled from political, religious, and other kinds of persecution. Under the Fifth and Eighth Circuit's decisions, a possession conviction that may subject a U.S. citizen to probation and participation in a drug-treatment program would operate as a categorical bar for a refugee-seeking asylum. The immigration judge would have no discretion whatever to grant asylum, regardless of how great the risk of persecution the refugee faces in her home country. And a conviction for drug possession could mean that a person who has already been granted asylum will be returned to a country where she will face a threat to her life or freedom.

When it acceded to the Protocol, the United States committed to provide certain substantive protections to refugees, regardless of their legal status. Chief among these is the protection against "*refoulement*" to persecution—the return of the refugee to a place where her life or freedom would be threatened. Although the country of refuge may

deny protection against *refoulement* based on criminal convictions in that country, this bar is limited to those "who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country." CONVENTION, art. 33(2) (incorporated by reference and reproduction by the Protocol).

To accept the Government's position in this case would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. Even under the restrictive federal Controlled Substances Act, it is difficult to imagine how a simple possession offense with no proof of "trafficking" could be considered a "particularly serious crime" that necessarily renders a person a "danger to the community." Indeed, even the federal government classifies nearly all first-time drug possession offenses as misdemeanors, 21 U.S.C. § 844(a)—a fact quite inconsistent with the suggestion that a simple possession conviction can be an "aggravated felony" and thus a "particularly serious crime."

A statute may not be construed in a manner that would put the United States in violation of its international treaty obligations unless its language unambiguously compels that result. *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that this statutory scheme is susceptible to more than one meaning, this doctrine provides an additional reason to adopt a reading that limits "aggravated felon[ies]" to drug crimes involving "illicit trafficking"—or, at the very least—that excludes state convictions for simple possession.

ARGUMENT

I. The United States has agreed to protect refugees from *refoulement* to persecution, and its statutes were intended to reflect that commitment.

Almost 40 years ago, the United States acceded to the Protocol Relating to the Status of Refugees. In so doing, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv.* v. *Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an international refugee protection regime to ensure the protection of those who flee persecution.[3]

Article 33 of the Convention is incorporated into the Protocol by reference and reproduction. The first paragraph of Article 33 "provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Specifically, the first paragraph states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

[3] See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at *http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.htm?tbl=PROTECTION&page=home&id=3ae68c248.*

> nationality, membership of a particular social group or political opinion.

PROTOCOL, art. 33, 19 U.S.T. 6223. This is commonly known as the protection of "non-*refoulement*." As the Secretary of State correctly explained when the Protocol was under consideration: "[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.'" *Stevic*, 467 U.S. at 428; see also CONVENTION, prbl. ¶ 2 (these provisions were intended to address the international community's "profound concern for refugees" and "to assure refugees the widest possible exercise of [their] fundamental rights and freedoms").

The second paragraph of Article 33 describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, ***or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country***.

Id. art. 33(2) (emphasis added).

Congress enacted the Refugee Act in 1980 for the primary purpose of bringing the United States into conformance with the language and requirements of the Protocol and Convention. See *Cardoza-Fonseca*, 480 U.S. at 436. The Act reaffirmed this Nation's commitment to "one of the oldest themes in [its] history—welcoming homeless refugees to our shores." S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

As part of that effort, Congress amended the Immigration and Nationality Act ("INA") to add the provision codifying the method by which a refugee can obtain asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Congress also amended the provision in the INA permitting refugees to terminate removal proceedings against them, providing that the Attorney General will not return any alien to a country if he concludes that the alien's life or freedom would be threatened because of persecution. *Stevic*, 467 U.S. at 409. This form of protection—known as "withholding of removal"—is mandatory (not discretionary) and is intended to codify the non-*refoulement* obligation under the Convention. See 8 U.S.C. § 1231(b)(3)(A); *Stevic*, 467 U.S. at 421 (U.S. can meet its obligations under the Protocol by providing either asylum or withholding of removal to an alien who meets the definition of a refugee). Eligibility for withholding of removal requires a demonstration of a "clear probability" that the alien's life or freedom would be threatened. 8 U.S.C. § 1231(b)(3)(A) & (b)(3)(B).[4]

[4] The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article 1 of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 136, 138 (1996); *Stevic*, 467 U.S. at 428. Withholding of removal is mandatory for refugees who meet this higher threshold, whereas asylum is formally discretionary. 8 U.S.C. § 1231(b)(3); 8 U.S.C. § 1158(b)(1); *see Stevic*, 467 U.S. at 428; *Cardoza-Fonseca*, 480 U.S. at 423.

In seeking protection in the U.S., refugees generally apply for both asylum and withholding of removal. There are important differences between these two types of relief, however. For example, an asylee can work without an employment authorization document and can obtain an unrestricted social security card. See U.S. Citizenship & Immigration Serv., *Types of Asylum Decisions*, *http://www.uscis.gov/graphics/services/asylum/types.htm#grant*. She may apply for a refugee travel document that will allow for travel abroad. See 8 C.F.R. § 223.1(b). And she may apply to adjust her status to that of legal permanent resident one year after receiving asylum, putting her on the path to U.S. citizenship. See 8 C.F.R. § 209.2(a). In addition, as recommended by the Final Act of the Conference that adopted the Convention, in order to preserve family unity, an asylee can apply for derivative asylum status for her spouse and minor children. 8 U.S.C. § 1158(b)(3).[5]

While a refugee who is granted withholding of removal will still be protected from deportation to her country of persecution, she could still be deported to another country. She is also not entitled to bring her spouse and children to safety in the United States or to any of the other benefits of asylum described above.

II. U.S. law bars a person convicted of a "particularly serious crime" from both asylum and withholding of removal, and it equates a "particularly serious crime" with an "aggravated felony" under the INA.

In the context of both asylum and withholding of removal, Congress added language that tracks the exception

[5] See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. VI (Reedited 1992) ("HANDBOOK") (attaching recommendation of the Final Act of the Conference).

in the second paragraph of Article 33. Thus it excepted any refugee who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community" from the benefits of both of these statutes. 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1253(h)(2)(B), *repealed and recodified*, 8 U.S.C. § 1231(b)(3)(B)(ii) ("the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community").

Congress has generally equated "aggravated felony" with "particularly serious crime" under the INA. See 8 U.S.C. § 1101(a)(43); see also 8 U.S.C. § 1158(b)(2)(B)(i). "Aggravated felony," in turn, is defined by the INA as follows:

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code).

8 U.S.C. § 1101(a)(43)(B). It is that definition that is at issue in these companion cases. As shown below, because an alien becomes ineligible to remain in the United States upon conviction of an "aggravated felony," this Court's interpretation of that term in this case will have dramatic implications for immigrants who face persecution if they are returned to their countries of nationality.

A. A person who commits an "aggravated felony" is automatically ineligible for asylum.

As noted above, the U.S. will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

A refugee who has committed an "aggravated felony" while in the United States, however, is automatically ineligible for a grant of asylum, notwithstanding her fear of persecution. See 8 U.S.C. § 1158(b)(2)(A)(ii) & (b)(2)(B)(i). As discussed above, Section 1158(b)(2)(A)(ii) of Title 8 provides categorically that asylum is not available to one convicted of a "particularly serious crime." That statute further provides that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). These provisions thus erect an automatic bar to asylum for anyone who has been convicted of an "aggravated felony."

The implications of this bar to asylum are grave. As discussed above, a grant of asylum carries with it a number of important rights and benefits that assist a refugee and her family to become integrated into American society, including the ability to work without an employment authorization document, to apply after one year to adjust her status to that of a legal permanent resident, and to apply for derivative asylum status for immediate family members. Under the Fifth and Eighth Circuits' reading of the relevant statutes, a refugee convicted of a single count of drug possession and sentenced to probation and a treatment program would be denied all of these important benefits of asylum, if she happened to live in a state that identifies such a crime as a felony.

B. A person who commits an "aggravated felony" is presumptively ineligible for withholding of removal.

A person who is not a U.S. citizen and lacks valid immigration status may be "removed" on that basis. Likewise, a person who has been granted legal status in this country, even a lawful permanent resident, can be "removed" if she engages in criminal conduct. As noted

above, however, a refugee will be entitled to "withholding of removal" if she can show that her life or freedom would be threatened upon her return on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. § 1231(b)(3)(A).

"Withholding of removal" is not available if the Attorney General decides that "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii).[6] Although the statute itself does not define the term "particularly serious crime," the final clause of Section 1231(b)(3) provides:

> for purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from

[6] The regulations implementing the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contain an identical exception barring "withholding of removal" for those convicted of "particularly serious" crimes. See 8 C.F.R. § 208.16(d)(2) (2001). Those convicted of "particularly serious crimes" do remain eligible for *deferral* of removal, which does not result in a grant of U.S. residency, does not necessarily result in a release from custody, and is subject to termination if the conditions change. See 8 C.F.R. § 208.17(a), (b)(i)-(iv). Furthermore, to establish eligibility for deferral of removal, an alien must establish that it is "more likely than not" she would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.17(a), 208.18(a). Deferral of removal thus will not protect refugees who would face a probability of persecution in their home countries if that persecution does not meet the definition of "torture" or takes place without the requisite level of state involvement.

> determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3) (final clause).[7] Thus, by statute, a refugee convicted of an aggravated felony and sentenced to at least five years of imprisonment is ***automatically*** deemed to have committed a "particularly serious crime" that bars her from receiving "withholding of removal." *Matter of Y-L-*, 23 I&N Dec. 270, 273 (A.G. 2002).

If a state possession felony is deemed an "aggravated felony" under the statutes at issue here, even a refugee with a suspended sentence who serves little or no time could fall under this automatic bar to withholding of removal. See 8 U.S.C. § 1101(a)(48)(B (five-year threshold includes suspended sentences). For example, if petitioner Jose Antonio Lopez had otherwise been entitled to "withholding of removal," he would have been denied that protection under the automatic bar in light of his state felony conviction for aiding and abetting possession, for which he was sentenced to five years and yet served only 15 months. J.A. 22. Thus a refugee in his position could be returned to death or death in a country he had fled because of political, religious, or other persecution, solely because of a single possession conviction that entailed relatively little jail time.

For refugees with a total sentence of less than five years, the Attorney General has discretion to conclude that the "aggravated felony" is not a "particularly serious crime" and hence does not bar withholding of removal. *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)). Under the Attorney General's decision in

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[7] Prior law provided that *all* aggravated felonies constituted "particularly serious crime[s]." See 8 U.S.C. § 1253(h)(2) (1994). That provision was later eliminated and replaced by the current definition of "particularly serious crime" contained in the last clause of 8 U.S.C. § 1231(B)(3) (cited above).

Matter of Y-L-, however, drug offenses with a sentence of less than five years that are deemed to be "drug trafficking" aggravated felonies trigger a ***presumptive*** bar on withholding of removal, with very limited exceptions. Although the convictions before the Attorney General in that case actually involved evidence of "trafficking," the Government will likely apply the *Y-L-* presumption to any crime that falls within the definition of "drug trafficking crime" as that term is used in 8 U.S.C. § 1101(a)(43)(B). Based on the Government's position here, a state felony for simple possession would fall within that definition.

In the *Y-L-* case, the Attorney General concluded that such drug-related aggravated felonies presumptively constitute "particularly serious crimes" within the meaning of the statutes governing withholding of removal. 23 I&N Dec. at 274 (overruling *Matter of S-S-*, Interim Decision 3374 (BIA 1999), which invoked a case-by-case review to determine which crimes are "particularly serious"). He further concluded that only under the most "extraordinary and compelling" circumstances would departure from this interpretation be warranted or permissible. *Id.* He noted that, at a minimum, those circumstances would need to include ***all*** of the following criteria:

> (1) a very small quantity of the controlled substance;
>
> (2) a very modest amount of money paid for the drugs in the offending transaction;
>
> (3) merely peripheral involvement in the criminal activity, transaction, or conspiracy;
>
> (4) the absence of any violence or threat of violence, implicit or otherwise;
>
> (5) the absence of any organized crime or terrorist organization involvement, direct or indirect; and

> (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Id. at 276-77.

According to the Attorney General, only if ***all*** of these criteria were present would it be appropriate to consider whether other, additional "unusual circumstances" justify departure from the presumption that drug-related aggravated felonies are "particularly serious." *Id.* at 277; *Tunis*, 447 F.3d at 449. Additionally, the Attorney General stated that facts such as "cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" do not justify deviation from the presumption. 23 I&N Dec. at 277.

To be sure, the *Y-L-* standard purports to create a rebuttable presumption and not a per se rule that drug-related aggravated felonies with sentences of less than five years are "particularly serious." See *Ford* v. *Bureau of Immigration & Customs Enforcement's Interim Field Office Director*, 294 F. Supp. 2d 655, 661-62 (M.D. Pa. 2003) (stating "[t]he Attorney General in *Matter of Y-L-* stopped short of creating a per se rule that all drug trafficking convictions constitute "particularly serious crimes"); 8 C.F.R. § 208.16(d)(3) ("[I]t shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime."). As a practical matter, however, the standard set out by the Attorney General in *Y-L-* is close to a complete bar on withholding of removal, simply because the exception is so narrow. Although a first-time simple possession offense with a sentence of less than five years might meet most or all of the *Y-L-* factors listed above, that fact alone would not guarantee that "withholding of removal" would be available under the terms of *Y-L-*.

As this discussion illustrates, this Court's interpretation of the term "aggravated felony" may have a significant impact on a refugee's ability to obtain asylum and to avoid *refoulement* to persecution in her home country. That impact cannot be ignored, particularly in light of the treaty issues to which we now turn.

III. The *Charming Betsy* doctrine compels a narrow reading of the definition of "aggravated felony."

This Court presumes that Congress intends its statutes to comply with the law of nations, unless the statute unambiguously states otherwise. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * * .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Thus, a statute that is susceptible to more than one reading should be interpreted in a manner that avoids conflict with the international treaty obligations of the United States. This basic rule has been followed by this Court in a variety of contexts.[8]

The briefs submitted by other *amici* in these cases explain in detail why the definition of "aggravated felony" should be understood to include only those drug crimes that

[8] *Weinberger*, 456 U.S. at 29-30, 32-33 (looking to international law in interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913) ("it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *Chew Heong* v. *United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to avoid conflict with treaty right of Chinese alien to enter the United States).

actually involve "***illicit trafficking*** in a controlled substance"—and, at the very least, why they cannot include state possession felonies that federal law would regard as only misdemeanors. To the extent that the definition of "aggravated felony" is also susceptible to a different meaning, however—and the Fifth and Eighth Circuits believe that it is—*Charming Betsy* dictates that it be interpreted in a manner consistent with the Nation's treaty obligations. As discussed below, interpreting the statute to encompass these types of simple possession crimes would put the United States in violation of its treaties relating to the status of refugees. There is no reason to believe that Congress intended such a result.

A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it generally regards as a misdemeanor.

The prohibition against *refoulement* to persecution is one of the core principles of the Convention (and of international refugee law generally). According to the Convention's preamble, its purpose is to ensure that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people. CONVENTION, prbl. ¶ 2. As discussed above, Article 33(1) of the Convention states that: "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Thus Article 33(1) affirms the basic principle that a person must not be removed from his country of refuge and sent back to a place where his life or freedom would be jeopardized. And the "particularly serious crime" exception of Article 33(2) creates only a very limited exception to the

fundamental right to non-*refoulement*.[9] See James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 293 (2001) (Article 33(2) authorizes *refoulement* to persecution only where it is necessary to protect the community in the host nation from an unacceptably high level of danger).

There can be no doubt that the United States would run afoul of its promise to protect all refugees except those who have committed a "particularly serious offense" if it were unwilling to protect those who were convicted of a crime punished as a misdemeanor under federal law. The United States' own controlled substances statutes thus provide the best evidence that a simple possession offense cannot be "particularly serious" for purposes of the Convention.

In general, federal law punishes the crime of drug possession only as a misdemeanor. See 21 U.S.C. § 844(a) ("Penalties for Simple Possession") (punishment is limited to less than one year unless other circumstances are present, as where the offender has been convicted of a similar crime before or where the drug is of a significant quantity and includes cocaine base); 18 U.S.C. § 3559(a)(6). Indeed, if a person is convicted of possessing a controlled substance in violation of 21 U.S.C. § 844 and has no previous drug-related convictions, "the court may, with the consent of such person, place him on probation for a term of not more than one year ***without entering a judgment of conviction.***" 18 U.S.C. § 3607(a) (emphasis added). Allowing a first-time offender to escape entry of a judgment of conviction for a

[9] In the record of proceedings connected with the adoption of Article 33(2), the U.S. delegate explained that "it would be highly undesirable to suggest in the text of [Article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." CONVENTION, *travaux préparatoires*. See Factum of the Intervenor, UNHCR, *Suresh* v. *Minister of Citizenship & Immigration*, S.C.C. No. 27790, at ¶ 63 (Mar. 8, 2001), *reprinted at* 14 INT'L J. REFUGEE L. 141.

crime is hardly consistent with the suggestion that that crime is "particularly serious" for purposes of the Protocol.

Congress's use of the term "serious" in other related contexts is also instructive. The offenses Congress identifies under its definition of "serious drug offense" in the main penalty provision under the Criminal Code involve either actual trafficking, participation in a continuing criminal enterprise, importing or exporting, or possession ***with the intent*** to "manufacture, distribute, or dispense" a controlled substance. See 18 U.S.C. § 3559(c)(2)(H) (citing 21 U.S.C. §§ 841(b)(1)(A), 848, 960(b)(1)(A)). Moreover, Congress penalizes those who commit a "serious drug offense" with a sentence of 10 years to life. 18 U.S.C. § 3559(c)(2); see also 18 U.S.C. § 924(e)(2)(A) (a "serious drug offense" is defined as a federal offense with a maximum sentence of 10 years or more, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute" with a maximum sentence of 10 years or more). By contrast, the maximum sentence for simple possession of any drug other than cocaine base is only three years, even for repeat offenders. See 21 U.S.C. § 844(a).

The structure of the "particularly serious crime" provisions in U.S. law also supports the view that Congress could not have intended to make every simple possession felony an "aggravated felony" for purposes of the INA. Article 33(2)'s exception applies, in relevant part, to anyone "who, having been convicted by a final judgment of a particularly serious crime, ***constitutes a danger to the community of that country***." CONVENTION art. 33(2) (emphasis added). The statutory scheme that Congress enacted to implement that exception has been interpreted to begin and end with whether the person committed a "particularly serious crime," without any case-by-case determination of "dangerousness." See, *e.g.*, *Urbina-Mauricio v. Immigration & Naturalization Serv.*, 989 F.2d 1085 (9th Cir. 1993) ("once a court has determined than an alien has been

convicted of a particularly serious crime, it need not make a separate finding that the alien constitutes a danger to the community; the latter follows naturally from the former"); *Matter of C.*, 20 I&N 529 (BIA 1992) (rejecting proposed two-step inquiry that would include a separate assessment of dangerousness).[10] Thus Congress presumably limited the terms "particularly serious crime" and "aggravated felony" to include only those crimes that it believed necessarily create a high risk of "danger to the community." It would be inconsistent with that presumption to interpret the definition of "aggravated felony" to include the crime of possessing a small quantity of drugs for personal use.

By definition, the term "particularly serious crime" cannot include an offense that Congress does not even regard as "serious." And given that the statutes have been found not to require a separate determination of "dangerousness," Congress must have intended the categories of "aggravated felony" and "particularly serious crime" to include only those crimes that necessarily pose a significant risk of danger to the community. For both of these reasons, to interpret the definition of "aggravated felony" to include all felony convictions for simple possession would put the United States in conflict with the Protocol, based upon the United States' own standards for the relative seriousness of crimes.

[10] This itself is a departure from the international standard. James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 537-38 (2000) ("Under the international standard, conviction by final judgment of a particularly serious crime is a necessary, but not sufficient, condition for removal.").

B. UNHCR materials confirm that a "particularly serious crime" is one of extreme gravity.

Although the Protocol and Convention do not define "particularly serious," the U.N. High Commissioner on Refugees ("UNHCR") has provided guidance as to what types of criminal convictions could legitimately allow an exception to the obligation of non-*refoulement*.[11] Those materials demonstrate that a simple possession offense could not possibly qualify as a "particularly serious crime" that renders a person "a danger to the community" without further inquiry.

For example, the exceptions in Article 33(2) are discussed in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. While the Handbook does not have the force of law, it does "provide significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). As relevant here, the Handbook highlights the fact that Article 33 permits a refugee's expulsion only in "extreme cases." HANDBOOK ¶ 154.

Indeed, the "particularly serious crime" exception in Article 33(2) is even narrower than Article 1(F) of the Convention, which states that the Convention does not apply "to any person with respect to whom there are serious

[11] The UNHCR was created in the wake of World War II to coordinate international action for the world-wide protection of refugees. Its primary purpose is to safeguard the rights and well-being of refugees. The U.S. is a member of the Executive Committee of the UNHCR.

reasons for considering that * * * he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee." CONVENTION art. 1(F)(b) (emphasis added).[12] As the Handbook explains, "a 'serious' crime must be a capital crime or a very grave punishable act" to fall within Article 1(F). HANDBOOK ¶ 155. "Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b)." *Id.* Obviously, a "***particularly*** serious crime" would need to be a crime that is even more grave than those "serious crimes" that fall under Article 1(F). See UNCHR Comments on Proposed Rules on "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings; and Asylum Procedures," at *http://www.usaforunhcr.org* (Feb. 4, 1997) ("A 'particularly serious crime' would be an even more restrictive category" than the category of "serious" crimes to which Article 1(F) refers); accord *Matter of Frentescu*, 18 I&N 244 (BIA 1982) (recognizing that a particularly serious crime is more serious than a serious non-political crime).

Another source of guidance is the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ("GUIDELINES").[13] This document also

[12] The history of these provisions confirms their relationship, as the discussions at the Conference of Plenipotentiaries specifically made note of the link between Article 33(2) and what was eventually to become Article 1F. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEE at 224 (1989). Therefore, Article 1(F) can aid how Article 33(2) is interpreted. See *id.*

[13] See *Castillo-Arias* v. *U.S. Atty. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("Reference to the UNHCR Guidelines * * * is permissible because the U.S. Supreme Court has held that Congress intended

discusses the exceptions in Article 33(2). The Guidelines emphasize that only individuals who commit "particularly grave crimes" are subject to the second exception in Article 33(2). GUIDELINES ¶ 16. Further, the Guidelines explain that "Article 33(2) concerns the future risk that a recognised refugee may pose to the host state." *Id.* ¶ 4.

Again, Congress presumably intended its statutory scheme to comply with Article 33(2) and to be limited to such "particularly grave crimes." Obviously, a simple possession conviction—without any evidence of involvement in trafficking or other aggravating circumstances—could not possibly meet that definition.

C. U.S. treaties relating to controlled substances also support the conclusion that simple possession cannot be a "particularly serious crime."

The treaties that relate to drug trafficking further suggest that simple possession cannot be a "particularly serious" crime under international law. The United States is party to a number of treaties on narcotics, including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Trafficking Convention"). See Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 8 INT'L J. REFUGEE L. 81, 93 (2006) (comparing provisions of the drug conventions with provisions of the Convention Relating to the Status of Refugees). "The cornerstone of the Trafficking Convention is Article 3 on 'Offences and Sanctions,' which distinguishes between 'criminal offences' (Art. 3.2), 'serious criminal offences' (Art. 3.1 and Art. 3.7)

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to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees."); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (noting the UNHCR's "analysis provides significant guidance for issues of refugee law").

and 'particularly serious offences' (Art. 3.5)." Gottwald, *supra*, at 94. It is Article 3.2 of this Convention that requires signatory nations to criminalize simple possession offenses, within the limits of their own constitutional law, whereas the other paragraphs of that article pertain to the actual sale and distribution of drugs. See TRAFFICKING CONVENTION, *supra*, art. 3. Under the Trafficking Convention, then, simple possession is categorized only as a "criminal offence" and not as a "particularly serious" or even "serious" offense.

Indeed, the Convention sets out a long list of factors to be considered before even a true drug distribution offense becomes "particularly serious." See TRAFFICKING CONVENTION, *supra*, art. 3.5 ("The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious * * * ."). Those factors may include the involvement of international organized crime; the involvement of the offender in other illegal activities facilitated by commission of the offense; the use of violence or arms; the fact that the offender holds a public office and that the offense is connected with the office in question; and the victimization or use of minors. *Id.* If even the distribution of narcotics is not "particularly serious" without facts such as these, then surely a simple possession offense cannot be considered "particularly serious."

CONCLUSION

In light of the implications of the issue for refugees and for the Nation's compliance with its international treaty obligations regarding refugees, *Amicus* urges this Court to reverse the decisions of the Fifth and Eighth Circuits and to adopt a narrow reading of the "aggravated felony" definition that excludes convictions for simple possession. At the very least, the definition must exclude state

possession offenses that would be considered misdemeanors under federal law.

Respectfully submitted.

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v.
ALBERTO R. GONZALES, Attorney General of the United States,
Respondent.

REYMUNDO TOLEDO-FLORES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

BRIEF FOR AMICI CURIAE NYSDA IMMIGRANT DEFENSE PROJECT, AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL LEGAL AID AND DEFENDER ASSOCIATION SUPPORTING PETITIONERS

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The question in this case is whether a state conviction for simple possession of a controlled substance qualifies as an "aggravated felony" within the meaning of the Immigration and Nationality Act. The courts of appeals have misconstrued and disregarded the critical statutory terms of 8 U.S.C. § 1101(a)(43)(B) and, as a result, have reached different conclusions on this question. Amici respectfully submit the instant brief to demonstrate that the statute, properly understood based on its plain language, does not encompass simple drug possession offenses. Accordingly, the judgments below in *Lopez* v. *Gonzales*, 417 F.3d 934 (8th Cir. 2005), and *United States* v. *Toledo-Flores*, 149 Fed. Appx. 241 (5th Cir. 2005), should be reversed.

INTEREST OF AMICI[1]

The NYSDA Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to advancing the legal rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP trains and advises both criminal justice and immigrant advocates on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for non-citizens accused of criminal conduct and therefore has a keen interest in the fair and just administration of the nation's immigration laws.

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The Immigrants' Rights Project ("IRP") of the ACLU conducts a nationwide program of litigation and advocacy to

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[1] Pursuant to Rule 37.3(a), letters of consent to the filing of this brief are being lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

enforce and protect the constitutional and civil rights of non-citizens.

Founded in 1946, the American Immigration Lawyers Association ("AILA") is a national nonprofit association of over 9,500 attorneys and law professors who practice and teach in the field of immigration and nationality law. AILA works to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice in the United States. AILA member attorneys represent tens of thousands of immigrant families and regularly appear before federal courts throughout the United States.

The Immigrant Legal Resource Center ("ILRC") is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates to advance immigrant rights. Among its other areas of expertise, the ILRC is a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal convictions.

Founded in 1958, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. NACDL is dedicated to promoting criminal law research, encouraging integrity, independence, and expertise among criminal defense counsel, and advancing the proper and efficient administration of justice. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit corporation dedicated to supporting indigent defender services and providing civil legal assistance. NLADA has approximately 680 program members, representing 12,000 lawyers, as well as approximately 1,000

individual members. NLADA is a leading voice in public policy debates on equal justice issues, and it is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

BACKGROUND

Statutory Framework

Title 8 U.S.C. § 1101(a)(43)(B) defines when a noncitizen may be deemed an aggravated felon. The provision provides in relevant part that the term "aggravated felony" means:

> illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18). . . . The term applies to an offense described in this paragraph whether in violation of Federal or State law . . . .

In other words, those who are convicted of "illicit trafficking" "including" a "drug trafficking crime" are subject to treatment as aggravated felons.

In properly interpreting this provision, three terms must be understood and given effect: "illicit trafficking," "including," and "drug trafficking crime." The first relevant term, "illicit trafficking," is not statutorily defined. The second relevant term, "including," is also not defined. The final relevant term, "drug trafficking crime," is defined by cross reference to 18 U.S.C. § 924(c)(2), which in turn provides: "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

Virtually all of the courts that have considered the statute's scope have focused on the last term of the statute, namely, whether a particular crime purportedly qualifies as "a drug trafficking crime (as defined in section 924(c) of Title

18)."[2] These courts have essentially disregarded the rest of the statutory terms and have instead "'navigate[d] a rather confusing maze of statutory cross-references," *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695 (6th Cir. 2005) (quoting *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002)), tracing 8 U.S.C. § 1101(a)(43)(B) to 18 U.S.C. § 924(c)'s definition of "drug trafficking crime"; then to the Controlled Substances Act (21 U.S.C. § 801 et seq.); and often then to the "felony" definition of 21 U.S.C. § 802(13).

By following this path, the courts of appeals have encountered startling ambiguity, have adopted inconsistent interpretations of the same statutory language, and, in many circuits, have reached the somewhat jarring conclusion that a *state-law simple possession* offense can be a *"drug trafficking crime,"* and, therefore, an aggravated felony. *See, e.g., United States* v. *Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006) (concluding that a state-law misdemeanor conviction for possession of codeine, which resulted in sentence of sixty days, was a "drug trafficking crime" and therefore an aggravated felony).

The Petitioners

Petitioners Lopez and Toledo-Flores were convicted of possessing controlled substances in violation of state law. Specifically, Petitioner Lopez was convicted under the law of South Dakota for aiding and abetting the possession of a

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[2] *See, e.g., Lopez*, 417 F.3d at 937; *Toledo-Flores*, 149 Fed. Appx. at 242; *see also United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364-366 (1st Cir. 1996); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 (2d Cir. 1999); *United States* v. *Wilson*, 316 F.3d 506, 512-513 (4th Cir. 2003); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695-700 (6th Cir. 2005); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 533-534 (7th Cir. 2006); *United States* v. *Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1339-1341 (9th Cir. 2000); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999).

controlled substance (cocaine), and Petitioner Toledo-Flores was convicted under the law of Texas for simple possession of a mere 0.16 grams of cocaine. Although neither conviction included any element of trafficking or distribution, the courts below determined that each of these state-law possession offenses was a "drug trafficking crime" and, therefore, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B).

The determination that a non-citizen is an aggravated felon has serious consequences in both the criminal and immigration contexts. In the criminal sentencing context, the determination that a non-citizen is an aggravated felon increases the statutory maximum sentence for illegal reentry from two years to twenty years. 8 U.S.C. § 1326(a) & (b)(2); USSG § 2L1.2(b)(1)(C); *see also Almendarez-Torres* v. *United States*, 523 U.S. 224, 226 (1998). And, in the immigration context, while non-citizens are rendered deportable for virtually all possession crimes involving controlled substances, 8 U.S.C. § 1227(a)(2)(B), serious additional consequences flow if a non-citizen is denominated an aggravated felon. *See, e.g.*, 8 U.S.C. § 1229b(a) (forbidding the Attorney General from granting cancellation of removal if the applicant has been convicted of an aggravated felony); 8 U.S.C. § 1158(b)(2)(B)(i) (barring asylum for aggravated felons, even with a well-founded fear of persecution in their countries of removal); 8 U.S.C. § 1182(a)(9)(A)(i) (barring an aggravated felon from reentering the United States); 8 U.S.C. §§ 1101(f)(8) & 1427(a)(3) (permanently barring aggravated felons from obtaining United States citizenship).

SUMMARY OF ARGUMENT

Title 8 U.S.C. § 1101(a)(43)(B)—which renders "illicit trafficking in a controlled substance . . . including a drug trafficking crime" an aggravated felony—does not encompass state-law simple possession offenses. In construing § 1101(a)(43)(B), three separate terms must be understood and given effect: "illicit trafficking," "including," and "drug trafficking crime."

First, Congress's use of the word "including" demonstrates that the initial term, "illicit trafficking," sets forth the *broader* category, and that the later term, "drug trafficking," is a *subset* of this broader term. Based on the text's plain meaning and the presumption against rendering statutory provisions superfluous, "illicit trafficking" defines the outer bounds of conduct that is swept within § 1101(a)(43)(B), and "drug trafficking" is a component of that larger preceding class. *See infra* Part I.

Second, the plain meaning of the broader term, "illicit trafficking," is clear: According to dictionary definitions, decades of consistent case law, and Congress's own use and definition of the term, "illicit trafficking" only covers actions connected to commercial activity (the trade, exchange, distribution for remuneration, or sale of drugs). Importantly, the plain meaning of "illicit trafficking" in a controlled substance does *not* include simple possession. *See infra* Part II.

Finally, the third term, "drug trafficking crime," is a component of the broader term "illicit trafficking." While the more expansive term, "illicit trafficking," explicitly covers both state and federal trafficking offenses, "a drug trafficking crime" only encompasses *federal* trafficking offenses. In other words, "illicit trafficking" describes the broader category of state and federal trafficking offenses; a "drug trafficking crime" (as defined in 18 U.S.C. § 924(c)(2)), describes the *federal subset* of trafficking offenses included in that broader category. *See infra* Part III.

ARGUMENT

I. "DRUG TRAFFICKING CRIME" IS A SUBSET OF "ILLICIT TRAFFICKING"

Title 8 U.S.C. § 1101(a)(43)(B) renders an immigrant an aggravated felon if he has been convicted of "illicit trafficking in a controlled substance . . . *including* a drug trafficking crime (as defined in section 924(c) of Title 18)" (emphasis added). Because the clause "drug trafficking crime" *follows* the word "including," "illicit trafficking" defines a general

class of offenses, and "drug trafficking crime" is a subset of that larger preceding group.

These two terms fit together in a natural way: The broader term "illicit trafficking" encompasses both *state and federal trafficking offenses*, and "drug trafficking crime," the narrower term in § 1101(a)(43)(B), only refers to the *federal* subset of this class. State-law possession offenses are therefore excluded from § 1101(a)(43)(B).

A. Enumerated Items Or Definitions That Follow The Word "Including" Are Part Of A Larger Preceding Group

The word "including" has a firmly established meaning. Black's Law Dictionary 777 (8th ed. 2004) defines the word "include" to mean: "To contain as a part of something." Webster's New International Dictionary 1258 (2d ed. 1959) defines "include" as: "To comprehend or comprise, as a genus the species, the whole a part . . . to contain; embrace." The American Heritage College Dictionary 687 (3d ed. 2000) defines "include" to mean: "(1) To take in as a part, an element, or a member. (2) To contain as a secondary or subordinate element. [or] (3) To consider with or place into a group, class, or total." Likewise, the Oxford English Dictionary 801 (2d ed. 1989) states that the word "including" "particulariz[es] a person or thing included in a group previously (or afterwards) mentioned; = Inclusive of."

This Court has frequently observed that the word "including" indicates that that which follows is a subset of the larger preceding class. *See S.D. Warren Co.* v. *Maine Bd. of Envt'l Protection*, 126 S. Ct. 1843, 1847 (2006) (observing that the term "discharge," which preceded the word "including," must be "broader" than the terms following the word "including"); *Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Helvering* v. *Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) ("[T]he verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."); *see also*

Chickasaw Nation v. *United States*, 534 U.S. 84, 85 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.' ") (quotation omitted).

Young v. *United States*, 315 U.S. 257 (1942), illustrates this principle. In *Young*, the Harrison Anti-Narcotic Act required "any manufacturer, producer, compounder, or vendor (including dispensing physicians)" who administered narcotics to keep adequate records. *Id.* at 258. Petitioner, a practicing physician, kept no records and was therefore convicted of dispensing narcotics in violation of the statute. This Court reversed petitioner's conviction. The Court stated that, in order to come within the Act's ambit, "the physician must be one who manufacturers, produces, compounds, or vends, or possibly only one who vends." *Id.* at 259. Even though the clause "dispensing physicians," if read in isolation, might cover petitioner, the word "including" demonstrated that "dispensing physicians" was a subset of the preceding terms; and because petitioner did not fall within any of the preceding categories (*i.e.*, he was not a manufacturer, vendor, or the like), he could not be "a 'dispensing physician' within the meaning" of the Act. *See id.* at 261.

In sum, under the plain meaning of the term "including," as well as under this Court's precedent, the term "illicit trafficking" defines a general class of offenses. A "drug trafficking crime" describes a particular and more narrow class of offenses contained within the broader "illicit trafficking" category.

B. The Government's Interpretation Fails To Give Meaning To Either The Term "Illicit Trafficking" Or "Including"

In its effort to interpret 8 U.S.C. § 1101(a)(43)(B) to encompass simple possession offenses, the Government ignores the word "including" and, in effect, renders the term "illicit trafficking" a nullity.

Under the Government's reading, a "drug trafficking crime" not only encompasses state and federal crimes that

have a trafficking component—it also covers a broad range of state-law simple possession offenses. The Government's sweeping definition essentially deprives the term "illicit trafficking" of any meaning and, therefore, is inconsistent with an "elementary canon of construction," the rule against superfluities. *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *see, e.g.*, *S.D. Warren Co.*, 126 S. Ct. at 1847; *see also infra* Section III.B.2 (detailing Congress's addition of the term "illicit trafficking").[3]

The Government may contend that "illicit trafficking" and a "drug trafficking crime" should be understood to be synonymous. As an initial matter, such a reading would again render the term "illicit trafficking" a nullity. *See Colautti*, 439 U.S. at 392. In addition, such a reading would violate the plain language of the statute. Title 8 U.S.C. § 1101 uses both the words "means" and "includes" or "including";[4]

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[3] In addition, the Government's expansive definition of the term "drug trafficking crime" makes the "controlled substance" category for deportability of aliens virtually meaningless. Title 8 U.S.C. § 1227(a)(2)(A)(iii) renders non-citizens denominated aggravated felons deportable, while § 1227(a)(2)(B) renders a non-citizen "convicted of a violation of (or a conspiracy or attempt to violate) any law . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana" deportable. Under the Government's reading of § 1101(a)(43)(B), virtually *every* controlled substance offense constitutes an aggravated felony. As such, virtually all controlled substances offenders are rendered deportable pursuant to § 1227(a)(2)(A)(iii) rather than the more natural § 1227(a)(2)(B), with the result that § 1227(a)(2)(B) is largely divested of independent effect. Likewise, the Government's interpretation leads to the nonsensical result that a person convicted under state law of possessing 30 grams or less of marijuana could be considered an aggravated felon pursuant to § 1101(a)(43)(B) if state law deems the offense a felony but not a controlled substances offender pursuant to § 1227(a)(2)(B), although the former denomination entails far harsher consequences than the latter.

[4] Section 1101 uses the word "mean" or "means" at least 46 times. *See, e.g.*, § 1101(a)(1), (a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), (a)(11), (a)(13)(A), (a)(15), (a)(16), (a)(18), (a)(19), (a)(20), (a)(21), (a)(22), (a)(23), (a)(26), (a)(27), (a)(29), (a)(30), (a)(31), (a)(33), (a)(34), (a)(37), (a)(38), (a)(39), (a)(40), (a)(41), (a)(42), (a)(43), (a)(44)(A), (a)(44)(B), (a)(45), (a)(46),

the specific subpart at issue, § 1101(a)(43)(B), however, employs only the word "including." Because Congress used both the words "means" and "including" throughout the statute, it is clear that these verbs are used intentionally and purposefully. *See Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). Congress therefore foreclosed any reading of "illicit trafficking" and "drug trafficking crime" that equates the two terms. *See S.D. Warren Co.*, 126 S. Ct. at 1849; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941); *see also United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 n.15 (1977); *Helvering*, 293 U.S. at 126 n.1.

Alternatively, the Government may attempt to defend the Board of Immigration Appeals' established interpretation of § 1101(a)(43)(B), which essentially substitutes the word "or" for the word "including." The Board of Immigration Appeals ("BIA") has properly held that, in order to constitute "illicit trafficking," an immigrant's controlled substance offense must contain a commonsense trafficking element and that a simple possession offense is not within this definition. *See, e.g., Matter of Davis*, 20 I. & N. Dec. 536, 540-541 (BIA 1992). In so holding, however, the BIA has erroneously severed § 1101(a)(43)(B) in two, holding that a person can be rendered an aggravated felon if he has been convicted of *either* "illicit trafficking" (which requires a nexus to trafficking) *or* a "drug trafficking crime" (as defined in § 924(c)). *Id.* at 543-544. The BIA has therefore effectively (and improperly) substituted the word "or" for the word "including."

In short, Congress did not use the word "means," "or," or any other connecting word or phrase; it instead chose the word "including." As a result, based on the plain language of

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(a)(47)(A), (a)(48)(A), (a)(49), (a)(50), (b)(1), (b)(2), (b)(3), (b)(4), (c)(1), (h). The word "including" or "includes" is used at least 17 times. *See, e.g.*, § 1101(a)(13)(C)(iv), (a)(14), (a)(15)(E) & (H) & (O)(ii)(III) & (U)(i)(IV) & (U)(ii)(V), (a)(17), (a)(28), (a)(36), (a)(43)(B) & (G), (b)(4), (b)(5), (c)(1), (c)(2), (f)(8). (This tally does not include the several times that the statute refers to that which is included "but is not limited to.")

the statute, "illicit trafficking" is the broader term and defines the outer bound of the statutory definition, and "drug trafficking crime" is a narrower subset of this broader category.

II. "ILLICIT TRAFFICKING" MEANS COMMERCIAL ACTIVITY INVOLVING THE TRADE, EXCHANGE, DISTRIBUTION FOR REMUNERATION, OR SALE OF GOODS, AND DOES NOT INCLUDE SIMPLE POSSESSION OFFENSES

"Illicit trafficking" is the broader term, fully encompassing the subset of "drug trafficking crime[s]." Because "illicit trafficking" is not defined, the term must be afforded its "ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994); *see Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995); *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).[5]

In this case, the plain meaning of the term "illicit trafficking" is clear. As evidenced by: (1) dictionary definitions; (2) over a century of consistent case law; (3) interpretations of "illicit trafficking" in the related aggravated felony *firearms* context; (4) Congress's use and definition of the term

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[5] The fact that the undefined term, "illicit trafficking," is coupled with a defined term, "drug trafficking crime," in no way relaxes the requirement that "illicit trafficking" be construed pursuant to its plain meaning. Indeed, if anything, Congress's decision to define "drug trafficking crime" but not "illicit trafficking" heightens the command that "illicit trafficking" be construed in its ordinary and natural sense. The recent case of *S.D. Warren Co.* is illustrative. That case also involved a statutory provision containing an undefined term, the word "includ[ing]," and statutorily defined terms. 126 S. Ct. at 1847. And, as in this case, the undefined term and the defined terms contained the same word (there, the word "discharge"). The Court observed that "[t]he dispute turn[ed] on the meaning" of the undefined term, and in ascertaining the meaning of that term, the Court looked to the word's plain meaning: "since it is neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning.'" *Id.* (quoting *Meyer*, 510 U.S. at 476).

"traffic" or "trafficking" in other statutes; and (5) the BIA's long-held interpretation of the clause "illicit traffic" to exclude those who merely possess illegal drugs—it is clear that "illicit trafficking" for purposes of § 1101(a)(43)(B) must involve commercial activity involving the trade, exchange, distribution for remuneration, or sale of a controlled substance. Quite simply, the plain meaning of "illicit trafficking" does not include possession offenses, such as those at issue here.[6]

A. Dictionary Definitions And Consistent Case Law Demonstrate That "Trafficking" Requires Commercial Activity

As commonly defined, "trafficking" necessarily involves commercial activity: the trade, exchange, distribution for remuneration, or sale of goods. Black's Law Dictionary 1534, for instance, defines "traffic" as "[c]ommerce; trade; the sale or exchange of such things as merchandise, bills, and money" or "[t]he passing or exchange of goods or commodities from one person to another for an equivalent in goods or money." Webster's New International Dictionary 2685 defines "traffic" as "to engage in commerce; to barter, buy or sell goods" or alternatively, "[t]o engage in illicit sale or purchase; to trade in something not properly for sale." Likewise, the American Heritage College Dictionary 1434 defines "traffic" as "[t]he commercial exchange of goods; trade." Mere possession does not and cannot constitute "trafficking" as the term is commonly defined and understood.

In keeping with these dictionary definitions, courts have, not surprisingly, long interpreted "trafficking" to require commercial activity. *See Urena-Ramirez* v. *Ashcroft*, 341 F.3d 51, 57 (1st Cir. 2003) ("Courts define 'illicit trafficking' as illegally 'trading, selling or dealing' in specified goods.") (citation omitted); *State* v. *Ezell*, 468 S.E.2d 679, 681

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[6] Indeed, no court of appeals has held, and the Government has not specifically argued, that simple possession offenses fall within the plain and ordinary meaning of "illicit trafficking."

(S.C. Ct. App. 1996) ("Trafficking imputes the carrying on or the engaging in a business. The word 'traffic' has a popular meaning of an exchange or passing of goods or commodities for other goods or money."); *People* v. *Horan*, 127 N.E. 673, 674-675 (Ill. 1920) ("The meaning of traffic in property . . . relates to commercial exchange of goods, wares, or any kind of merchandise, whether by barter or the use of money, bills of exchange, or other like means."); *People* v. *Dunford*, 100 N.E. 433, 434 (N.Y. 1912) ("The word 'traffic' has the popular meaning of an exchange, or a passing, of goods, or commodities, for an equivalent in goods, or money."); *Senior* v. *Ratterman*, 11 N.E. 321, 324 (Ohio 1887) ("The word 'traffic' has always had a well-understood meaning in the popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money, and a trafficker is one who traffics—a trader; a merchant."); *see also Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989) (where an undefined term has "accumulated [a] settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms") (quotation omitted); *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 59 (1911). Mere possession does not constitute "illicit trafficking."

Indeed, when the BIA construed the term "illicit trafficking" in *Matter of Davis*, the BIA held that "illicit trafficking" requires commercial activity. Relying on Black's Law Dictionary, the BIA explained that, "[e]ssential to the term . . . is its business or merchant nature, the trading or dealing of goods." 20 I. & N. Dec. at 541. Consequently, the BIA held, "[t]he offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of 'illicit trafficking.'" *Id.*

B. "Illicit Trafficking In Firearms" For Purposes Of § 1101(a)(43)(C) Requires A Trafficking Element

Another subpart of 8 U.S.C. § 1101 further establishes that the phrase "illicit trafficking" for purposes of § 1101(a)(43)(B) requires commonsense trafficking. The

term "illicit trafficking" appears not only in § 1101(a)(43)(B), but also in the very next provision, § 1101(a)(43)(C). Subsection (C) renders anyone who has engaged in "*illicit trafficking* in firearms or destructive devices . . . or in explosive materials" an aggravated felon (emphasis added). Because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994), the clause "illicit trafficking" should be interpreted in the same way in the neighboring controlled substance and firearm contexts.

Not surprisingly, both the BIA and the courts of appeals have routinely demanded a showing of trafficking in the firearms context of subpart (a)(43)(C). In *Kuhali* v. *Reno*, 266 F.3d 93, 98 (2d Cir. 2001), for instance, the petitioner pled guilty to conspiracy to export firearms and ammunition without a license. Before the BIA, the petitioner argued that his export offense did not involve "trafficking." The BIA rejected the argument stating that the "essential sense of the term [trafficking] was its business or merchant nature, *i.e.*, trading, selling or dealing in goods" and that exporting firearms without a license satisfied this standard. *Id.* at 107.

The Second Circuit affirmed, observing that the "Board's specific reading of the term trafficking comports well with the legal and everyday usages of that term" and that the unlicensed export of firearms exhibits a business or merchant nature such that it constitutes commercial "dealing" in firearms. 266 F.3d at 108-109 (citing Webster's New Collegiate Dictionary 1229 (1981)); *see also United States* v. *Lindquist*, 421 F.3d 752, 755 (8th Cir. 2005) (concluding that, for purposes of USSG § 2K2.1, "an offense falls within the ambit of 'firearms trafficking' when it involves illegal commercial activity involving firearms").

Under the Government's reading of § 1101(a)(43)(B), the term "trafficking" necessarily encompasses simple "possession." Yet, the same reading of the term in § 1101(a)(43)(C) would transform simple firearm possession into "trafficking" in firearms, a position that the Government itself has not

embraced. *See* United States Br., *Kuhali* v. *Reno*, No. 00-2531, *available at* 2001 WL 34120929, at *23 ("It is the movement of the firearms in international commerce that makes the offense a trafficking offense within the meaning of Section 101(a)(43)(C) of the INA."); *see also Hoong* v. *INS*, No. 95-70197, 1996 WL 297621, at *1 n.1 (9th Cir. June 3, 1996) (observing that, for purposes of 8 U.S.C. § 1101(a)(43)(C), "the mere possession of a weapon does not amount to 'illicit trafficking in firearms'").

C. Other Statutes Confirm That The Term "Illicit Trafficking" Requires A Commercial Element

Other provisions of the U.S. Code confirm that the term "trafficking" requires a commercial element. The terms "traffic" and "trafficking" appear frequently in the U.S. Code. When they appear, as one would expect, Congress consistently defines the terms to refer to commonsense trafficking rather than mere possession.[7]

1. Title 21 U.S.C. § 862—Enacted When The Term "Aggravated Felony" Was Coined And When § 924(c)(2) Was Amended—Distinguishes Between "Trafficking" And "Possession"

When Congress defined the term "aggravated felony," it clearly understood the difference between simple possession and trafficking offenses. Title 21 U.S.C. § 862, which denies federal benefits to controlled substance offenders, is particularly instructive, as Congress enacted it contempora-

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[7] *See* 2B N. Singer, *Sutherland on Statutory Construction* § 53.03, at 329 (6th ed. 2000) (recognizing that "by transposing the clear intent expressed in one or several statutes to a statute of doubtful meaning, the court . . . is able to give effect to the probable intent of the legislature"); *see also, e.g., Reno* v. *Koray*, 515 U.S. 50, 58 (1995) (using other statutes' construction of the clause "official detention" to aid interpretation of the clause in 18 U.S.C. § 3585(b) and noting that the same term "should bear the same meaning" in "related" statutes); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132 (1943) (using the Federal Employers' Liability Act to aid the interpretation of Fair Labor Standards Act of 1938).

neously with the definition of "aggravated felony." Section 862 expressly distinguishes between those convicted of *possessing* controlled substances and those convicted of *trafficking*. Section 862(a)(1), under the heading "Drug traffickers," states that "[a]ny individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances shall" be ineligible for federal benefits for up to five years after conviction.[8] Subpart (a)(1) therefore equates "traffickers" with those guilty of "distribution." Meanwhile, subpart (b)(1), under the heading "Drug possessors," states that "[a]ny individual who is convicted of any Federal or State offense involving the possession of a controlled substance" shall be ineligible for federal benefits for up to one year following conviction.

Importantly, Congress enacted 21 U.S.C. § 862 as part of the Anti-Drug Abuse Act ("ADAA") of 1988, Pub. L. No. 100-690, § 5301, 102 Stat. 4181, 4310.[9] This is *the very same Act* that introduced the term "aggravated felony" into the immigration law lexicon, made drug "traffick[ers]" aggravated felons, and amended 18 U.S.C. § 924(c)(2)'s definition of a "drug trafficking crime." *See Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004) (discussing the ADAA).

In summary, at the very same time and via the very same Act by which Congress made those who engaged in "drug trafficking" aggravated felons, Congress also: (1) expressly distinguished between possessors and traffickers, subjecting the latter to far harsher penalties; and (2) defined "traffick[ing]" by reference to "distribution." Thus—in light of the "basic canon of statutory construction that identical terms within an Act bear the same meaning," *Estate of*

---

[8] *See Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (while not controlling, a statute's title and heading are often informative); *see also, e.g., Porter* v. *Nussle*, 543 U.S. 516, 527-528 (2002) (relying on a provision's caption to determine its meaning).

[9] Title 21 U.S.C. § 862 was later amended in 1990, although it was not materially changed. *See* Pub. L. No. 101-647, § 1002(d), 104 Stat. 4827 (1990).

Cowart v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)—just as Congress excluded possession from the meaning of trafficking in § 862, Congress similarly excluded possession offenses from the definition of trafficking in the aggravated felony definition. *See Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); *see also, e.g., Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990); *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

2. Congress Repeatedly Uses "Trafficking" In Its Commonsense Way

In other portions of the U.S. Code as well, Congress repeatedly uses "trafficking" consistent with its plain meaning, *i.e.*, as requiring a connection to commercial activity, and Congress consistently distinguishes "trafficking" from "possession."

Title 18 U.S.C. § 1028(a)(8), for instance, makes it a crime to "knowingly traffic[] in false or actual authentication features for use in false identification documents, document-making implements, or means of identification." Subsection (d)(12) defines "traffic," for purposes of the statute, as "(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or (B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of." It is a separate crime to "possess" a fraudulent identification card with a nefarious intent.

Similarly, 18 U.S.C. § 2320(a), which outlaws trafficking in counterfeit goods or services, provides: "Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services . . . shall . . . be fined . . . or imprisoned[.]" Subsection (e)(2) states: "the term 'traffic' means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of." And 17 U.S.C. § 1101, which outlaws the unauthorized fixation and trafficking in sound recordings and mu-

sic videos, borrows this same definition of "traffic" from § 2320(e)(2). *See* 17 U.S.C. § 1101(b).

Indeed, when Congress defines the word "commerce" throughout the U.S. Code, it does so by reference to a few synonyms such as "trade" and "traffic." *See, e.g.*, 29 U.S.C. § 152(6); 29 U.S.C. § 652(3); 29 U.S.C. § 1002(11); 30 U.S.C. § 802(b).

In short, when the term "trafficking" appears in the U.S. Code, Congress defines the term in a manner consistent with its plain meaning and distinguishes the term from mere possession.

D. By The Time Congress Amended 8 U.S.C. § 1101 To Include The Term "Illicit Trafficking," The BIA Had Long Held That Possession Does Not Constitute "Illicit Trafficking"

Finally, in enacting legislation, Congress is presumed to be aware of longstanding administrative interpretations of particular statutory language. *See Commissioner of Internal Revenue* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). By the time Congress deemed those who engage in "illicit trafficking" aggravated felons, the term "illicit trafficking" had a settled administrative meaning, dating back half a century. As a result, when Congress amended the aggravated felony provision in 1990 to include the term "illicit trafficking," Congress incorporated the phrase's well-established interpretation. *Keystone Consol. Indus.*, 508 U.S. at 159 (concluding that because "[t]he phrase 'sale or exchange' had acquired a settled judicial and administrative interpretation," when Congress used the phrase, Congress incorporated the phrase's already settled meaning).

The Immigration and Nationality Act of 1952 made a non-citizen inadmissible to the United States if he or she, *inter alia*, had "been convicted of a violation of any law or regulation relating to the *illicit traffic* in narcotic drugs." 8 U.S.C. § 1182(a)(23) (1952) (emphasis added). The very year after this provision was enacted, the meaning of the clause

"illicit traffic" was challenged. The Government urged the BIA to conclude that a non-citizen who had been convicted of possession of narcotics under California law had engaged in "illicit trafficking" for purposes of the 1952 Act. *In the Matter of L----*, 5 I. & N. Dec. 169, 171 (BIA 1953). The BIA summarily rejected the Government's interpretation, concluding:

> The alien in the instant case was convicted merely of possession. . . . Traffic has been defined as commerce; trade; sale or exchange of merchandise, bills, money, and the like; the passing of goods or commodities from one person to another or an equivalent in goods or money; and a trafficker is one who trafficks or a trader, a merchant. . . . [A] conviction solely for possession, without more, . . . does not constitute a conviction of illicit traffic in narcotic drugs[.]

Id. at 171-172;[10] *see also In the Matter of B----*, 5 I. & N. Dec. 479, 480-481 (BIA 1953).

This definition of "illicit trafficking" was long-settled by the time Congress again enacted immigration legislation at 8 U.S.C. § 1101(a)(43)(B), using the precise term "illicit trafficking." In so doing, Congress could not have intended to reach those who merely possess illicit drugs.[11]

---

[10] In 1956, Congress added language to § 241(a)(11) of the Immigration and Nationality Act to make a conviction for "illicit possession" of narcotics a ground for deportation. *See* Narcotic Control Act of 1956, Pub. L. No. 84-728, § 301(a), 70 Stat. 567, 575. The amended language required the deportation of an alien convicted of a law "relating to the illicit possession of or traffic in narcotic drugs or marihuana." 8 U.S.C. § 1182(a)(23) (1956). Thus, Congress clearly understood "possession of" and "traffic in" drugs to be two distinct acts.

[11] Of course, if there is proof that a person possesses controlled substances *with an intent to sell them*, his or her conduct falls within the plain meaning of "trafficking." *See, e.g., Gonzales-Gomes* v. *Achim*, 441 F.3d 532, 534 (7th Cir. 2006); *see also Virginia* v. *Black*, 538 U.S. 343, 398 (2003) (Thomas, J., dissenting) (equating "possession with intent to distribute" with "trafficking"). Notwithstanding this caveat, there can be little doubt

* * *

In short, under its plain meaning—as reflected by dictionary definitions, decades of consistent case law, a companion firearm provision, other statutes, and the legislative backdrop dating back half a century—"trafficking" requires commercial activity and does not include simple possession. *See Matter of Davis*, 20 I. & N. Dec. at 541 ("The offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of 'illicit trafficking.'"); *see also Steele* v. *Blackman*, 236 F.3d 130, 136 n.5 (3d Cir. 2001) (equating "illicit trafficking" with "the marketing of drugs"); *Gonzales-Gomez* v. *Achim*, 372 F. Supp. 2d 1062, 1065 (N.D. Ill. 2005), *aff'd*, 441 F.3d 532 (7th Cir. 2006) ("It is undisputed that a simple drug possession does not constitute 'illicit trafficking in a controlled substance'[.]"). Petitioners' drug possession offenses do not constitute "illicit trafficking" within the meaning of § 1101(a)(43)(B).

III. A "DRUG TRAFFICKING CRIME" AS DEFINED BY 18 U.S.C. § 924(c)(2) REFERS TO ONLY *FEDERAL* TRAFFICKING OFFENSES

The final relevant term in the aggravated felony definition—"drug trafficking crime"—is a subset of the broader term "illicit trafficking." The broader term, "illicit trafficking," applies to all *federal and state* trafficking offenses. *See* 8 U.S.C. § 1101(a)(43) ("The term applies to an offense described in this paragraph whether in violation of Federal or State law[.]"); *Matter of Davis*, 20 I. & N. Dec. at 541 (concluding that "illicit trafficking" constitutes any state or federal felony conviction "involving the unlawful trading or dealing of any controlled substance"). The narrower term "drug trafficking crime" (as defined by 18 U.S.C. § 924(c)(2)) refers only to *federal* trafficking crimes. In other words, the

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that "possession" and "trafficking" are distinct categories—as demonstrated by the plain meaning of these words, as well as Congress's and the BIA's consistent use of these terms.

term "drug trafficking crime" defines the *subset of federal trafficking crimes* within the broader "illicit trafficking" category.

A. Section 924(c)(2)'s Plain Language And Broader Statutory Context Make Clear That The Term "Drug Trafficking Crime" Refers To Only Federal Offenses

Section 924(c)(2) defines "drug trafficking crime" for purposes of § 1101(a)(43)(B). It provides:

> For purposes of this subsection, the term "drug trafficking crime" means any *felony punishable under* the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2) (emphasis added).

By its plain terms, § 924(c)(2) reaches only federal felonies "punishable under," *inter alia*, the Controlled Substances Act. The federal Controlled Substances Act, by its terms, does not "punish" state-law-defined felonies, and, therefore, the plain language indicates that state-law crimes are not included. *See, e.g., Gonzales-Gomes*, 441 F.3d at 534. Indeed, other provisions of the statute—specifically, 18 U.S.C. § 924(g) and (k)—make it crystal clear that Congress did not intend to reach state-law violations. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see Reno* v. *Koray*, 515 U.S. 50, 56 (1995); *United States* v. *Morton*, 467 U.S. 822, 828 (1984).

Both § 924(g) and § 924(k) use the *identical key language* of § 924(c)(2), referring to conduct "punishable under the Controlled Substances Act . . . the Controlled Substances Import and Export Act . . . or the Maritime Drug Law Enforcement Act[.]" In addition, in both sections, Congress

separately refers to *state* controlled substance offenses, *i.e.*, violations of "any State law relating to any controlled substance."

Section 924(g) provides:

> Whoever, with the intent to engage in conduct which—
>
> (1) constitutes an offense listed in section 1961(1),
>
> (2) is *punishable under the Controlled Substances Act* (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),
>
> (3) *violates any State law* relating to *any controlled substance* (as defined in section 102(6) of the Controlled Substances Act, 21 U.S.C. 802(6)), or
>
> (4) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

18 U.S.C. § 924(g) (emphasis added).

Likewise, 18 U.S.C. § 924(k) provides:

> A person who, with intent to engage in or to promote conduct that—
>
> (1) is *punishable under the Controlled Substances Act* (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);
>
> (2) *violates any law of a State* relating to *any controlled substance* (as defined in section 102

> of the Controlled Substances Act, 21 U.S.C. 802); or
>
> (3) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

18 U.S.C. § 924(k) (emphasis added).

Subsections 924(g) and (k) demonstrate two key points. First, Congress's separate enumeration of state-law offenses in subsections (g)(3) and (k)(2), alongside the concurrent use of the phrase "punishable under the Controlled Substances Act" in subsections (g)(2) and (k)(1), show that Congress understood drug offenses "punishable under the Controlled Substances Act" *not* to include state offenses. Thus, the phrase "punishable under the Controlled Substances Act"—whether appearing in § 924(c), (g), or (k)—refers to a crime that is or has been punished under that Act, as the plain language indicates. If it were otherwise, subsections (g)(3) and (k)(2), which refer to state-law controlled substances offenses, would be superfluous and "practically devoid of significance," *Leocal*, 543 U.S. at 12.

Second, subsections (g)(3) and (k)(2) show that, in the CSA, when Congress intended to reach a defendant who had violated a state-law drug crime, Congress made its intent explicit. *See Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 176-177 (1994). Congress *intentionally* referred to state-law offenses in subsections (g) and (k) but not in (c)(2). Under a bedrock canon of statutory construction, § 924(c)(2), which speaks only of federal offenses, located in the same statute as subsections which speak of state offenses, cannot be construed to reach those who have violated only state law. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the dispa-

rate inclusion or exclusion.") (quotation omitted); *see also Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452-454 (2002); *Duncan* v. *Walker*, 533 U.S. 167, 173-174 (2001). The "distinct provision" for state-law controlled substances offenses under subsections (g)(3) and (k)(2)—coupled with its noteworthy absence in (c)(2)—compels the conclusion that neither subsection (c)(2) itself, nor its substantive language, "encompass[es]" controlled substance offenses where the conviction is obtained pursuant to state law. *See Leocal*, 543 U.S. at 12.

Significantly, these comparable provisions were not only enacted by the same Congress and not only appear in the same statute—but *one is an immediately adjacent section of the very same Act.* In 1988, in § 6212 of the ADAA, Congress amended the definition of "drug trafficking crime" to its current form in 18 U.S.C. § 924(c)(2). *See* Pub. L. No. 100-690, § 6212, 102 Stat. 4181 (1988). Meanwhile, § 6211 of the ADAA—the preceding section of the very same Act—also enacted what is now 18 U.S.C. § 924(g) (set forth above). Hence, at the very moment Congress first defined a "drug trafficking crime" to refer to crimes "punishable under the Controlled Substances Act" (and two other specific statutes), Congress enacted the neighboring provision that makes clear that such language does *not* reach state-law crimes.

B. The Statutory Evolution Of § 924(c) And The Aggravated Felony Definition Confirm That § 924(c) Refers To Only Federal Offenses

The statutory evolution of § 924(c) and the aggravated felony definition underscore what the language of 18 U.S.C. § 924 makes plain: a "drug trafficking crime" refers only to crimes prosecutable under federal law.

1. The 1988 "Clarification" To The Definition Of "Drug Trafficking Crime"

The fact that § 924(c) only applies to federal offenses is further supported by its predecessor provision. That section provided an enhancement for "any felony violation of *Fed-*

eral law involving distribution, manufacture, or importation of any controlled substance" (emphasis added). In 1988, Congress made a "clarification" to the definition of "drug trafficking crime," substituting in "any felony punishable under," *inter alia*, "the Controlled Substances Act." *See* ADAA, Pub. L. No. 100-690, § 6212, 102 Stat. 4181 (1988). In so doing, Congress did not alter the statute's scope. Congress labeled its amendment a "*clarification* of definition of drug trafficking crimes" and was delineating the types of *federal* trafficking crimes within the definition's grasp; nowhere in the statute or legislative history did Congress refer to state crimes or indicate that this "clarification" was intended to greatly expand the provision's reach. 134 Cong. Rec. S17301, at S17363 (1988) (Section Analysis of Judiciary Comm. Issues in H.R. 5210 by Sen. Biden); *see also Gonzales-Gomez*, 441 F.3d at 534; *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 914-916 (9th Cir. 2004); *Gerbier* v. *Holmes*, 280 F.3d 297, 308-309 (3d Cir. 2002).

Indeed, as noted above, in a neighboring provision of the very same Act, Congress added what is now § 924(g), making clear that Congress intended the phrase "any felony punishable under the Controlled Substances Act" (and two other federal drug statues) to refer only to federal crimes. *See* ADAA, Pub. L. No. 100-690, § 6211, 102 Stat. 4181 (1988); *see also supra* Section III.A.[12]

2. The 1990 Expansion To The Definition Of "Aggravated Felony"

The fact that § 924(c)—pre- and post-1988—is limited to federal crimes is further demonstrated by the 1990 amendments to the definition of "aggravated felony."

In amending 8 U.S.C. § 1101(a)(43)(B) in 1990, Congress's avowed purpose was to reach those convicted of *state*

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[12] Congress also enacted 21 U.S.C. § 862 at the same time. As noted *supra* in Section II.C.1, 21 U.S.C. § 862 distinguishes between possessors and traffickers and also, unlike the amended 18 U.S.C. § 924(c)(2), explicitly reaches those convicted of state, as well as federal, offenses.

drug trafficking offenses. *See, e.g.*, H.R. Rep. No. 101-681, at 147 (1990) (noting that the amendment's purpose was to specify that a state drug trafficking conviction renders a non-citizen an aggravated felon).

The fact that Congress amended § 1101(a)(43)(B) in order to reach state trafficking crimes is revealing: If "drug trafficking crime" under § 924(c) already encompassed state-law trafficking crimes, no amendment would have been necessary. But that was not the case. Prior to 1990, an aggravated felony only included "any drug trafficking crime as defined in section 924(c)(2) of Title 18, United States Code," *i.e.*, a federal drug offense. Congress's 1990 amendment thus demonstrates that that language does not extend to state-law crimes.

The manner in which Congress amended § 1101(a)(43)(B) is likewise revealing. In seeking to reach state offenses, Congress did not amend the underlying "drug trafficking crime" definition of 18 U.S.C. § 924(c)(2). The "drug trafficking crime" definition—and the reference to it in the aggravated felony definition—remained unchanged.

Rather, mindful of § 924(c)(2)'s limitations, Congress reached state trafficking crimes in a different way. First, it added the more general and encompassing term, "illicit trafficking in a controlled substance," which is now the first (and broader) clause of § 1101(a)(43)(B).[13] Second, it added a new provision at the end of subsection (a)(43), stating: "The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law[.]" 8 U.S.C. § 1101(a)(43).[14]

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[13] As noted above, the Government's sweeping interpretation of "drug trafficking" crime essentially swallows the term "illicit trafficking." Thus, the Government's interpretation would require the Court to accept that Congress specifically amended the statute in 1990 by adding words ("illicit trafficking in a controlled substance") that have little or no meaning.

[14] *See* Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 4978, 5048, as corrected by Miscellaneous and Technical Immigration

Hence, in seeking to expand the "aggravated felony" category to encompass state-law trafficking crimes, Congress added the broad term "illicit trafficking" and made clear that it applies to state and federal trafficking crimes. Significantly, it left the definition of § 924(c), which only applies to federal crimes, unchanged.[15]

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and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(1), 105 Stat. 1733, 1751.

[15] In enacting the 1990 amendment, Congress expressed its approval of the ultimate outcome of a BIA decision, *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990). In that case, the BIA construed § 1101(a)(43)(B) to extend to state controlled substance trafficking offenses. But while Congress approved of the ultimate *effect* of the BIA opinion, Congress clearly did not approve of the BIA's *reasoning* (*i.e.*, "that the definition of 'drug trafficking crime' . . . encompasses state convictions for crimes," *id.* at 177-178). Had Congress approved of the BIA's reasoning and agreed with the BIA that the clause "drug trafficking crime" reached state offenses, there would have been no need to add a new clause—"illicit trafficking"—into § 1101(a)(43)(B)'s statutory definition.

* * *

As demonstrated by its plain language, the statutory context, and its statutory evolution, § 924(c)(2)'s definition of a "drug trafficking crime" only covers *federal* crimes.[16] Thus, while "illicit trafficking" in a controlled substance encompasses both state and federal trafficking crimes, a "drug trafficking crime" as defined by § 924(c) only refers to the *federal subset* of trafficking offenses.

CONCLUSION

Petitioners' state-law convictions for possession of controlled substances do not constitute "illicit trafficking in a controlled substance" or a "drug trafficking crime" within the meaning of 8 U.S.C. § 1101(a)(43)(B). Accordingly, Petitioners were improperly denominated "aggravated felons." The judgments of the United States Courts of Appeals for the Eighth and Fifth Circuits should be reversed.

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[16] Indeed, § 924(c) captures all federal trafficking offenses: § 924(c)(2) defines a "drug trafficking crime" by reference to felonies, and under federal law, all federal trafficking crimes are felonies. In contrast, virtually all first-time drug possession offenses are classified not as felonies, but as misdemeanors. *See* 21 U.S.C. § 844(a).

It is true that, under the CSA, possessing a mixture or substance that contains more than five grams of cocaine base constitutes a felony, as does possession of flunitrazepam. 21 U.S.C. § 844(a). While it could be argued that Congress deemed such offenses trafficking crimes, the better argument is that such offenses are not "drug trafficking crime[s]" for purposes of § 1101(a)(43)(B). The broader clause, "illicit trafficking," limits what constitutes a "drug trafficking crime" for purposes of § 1101(a)(43)(B): A "drug trafficking crime" without any trafficking nexus falls outside § 1101(a)(43)(B)'s scope. *See Dolan* v. *United States Postal Serv.*, 126 S. Ct. 1252, 1257 (2006) (recognizing that a word's meaning may be limited by the terms that precede it); *see also, e.g.*, *Chickasaw Nation*, 534 U.S. at 85 (refusing to give Congress's reference to "chapter 35" full effect because the reference to "chapter 35" was prefaced by the word "including" and was therefore circumscribed by the remainder of the subsection); *Young*, 315 U.S. at 259-260 (concluding that the clause "dispensing physicians," prefaced by the word "including," was limited by the preceding terms).

Respectfully submitted.

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v.
ALBERTO R. GONZALES,
Respondent.

REYMUNDO TOLEDO-FLORES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the
United States Courts of Appeals for the Eighth and Fifth Circuits

BRIEF OF TEXAS, ARKANSAS, COLORADO, DELAWARE, IDAHO, KANSAS, NEW HAMPSHIRE, PENNSYLVANIA, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether prior state convictions for possession of a controlled substance constitute "aggravated felon[ies]" triggering (1) a recommended sentence enhancement under §2L1.2(b)(1)(C) of the Sentencing Guidelines or (2) negative immigration consequences under the Immigration and Naturalization Act when the prior conviction was a felony under state law but would have been a misdemeanor under federal law.

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INTEREST OF *AMICI CURIAE*

No values are more central to the States than the preservation of law and order and the protection of the health and safety of the citizenry. Immigration policy embodies both. The States are united in welcoming legal immigrants to the melting pot that is America, while at the same time valuing a true and secure national border.

Enforcement of criminal laws has likewise traditionally been a core function of the States. *See, e.g.*, THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., 1961). And all of these state interests converge with respect to the illegal immigration of previously adjudged felons. Indeed, the States' interests are at their zenith concerning those individuals who have been found, under state law, to be felons. In proscribing and defining conduct as felonious, state legislatures have made the policy judgment that such conduct is the most objectionable and dangerous to the citizenry, and that normative judgment by the States is due considerable respect. Every State has a vital interest in securing our Nation's borders, including against the illegal immigration of aggravated felons.

Although recent years have seen a significant proliferation of federal criminal laws, particularly concerning the use and sale of drugs, the federal government lacks the resources to investigate and prosecute the full spectrum of criminal offenses. This function remains largely the province of the States.

When Congress wishes to account for individuals' past criminal behavior in making certain criminal or regulatory determinations, it cannot do so comprehensively without relying on state as well as federal convictions. Therefore, Congress increasingly incorporates consideration of state convictions into the scope and application of federal criminal and regulatory laws. In so doing, Congress may, as a matter of comity and efficiency, infuse federal law with the States' policy and normative judgments. This approach can be viewed as a natural outgrowth of increasing the federalization of

criminal and regulatory law while respecting the structure of our system of federalism.

This appeal involves two areas—sentencing enhancement and immigration—in which Congress has taken such an approach, choosing to rely on state convictions and state determinations as to the severity of the particular crime (felony or misdemeanor). The States have a strong interest in ensuring that their normative criminal-law judgments are respected as Congress intended.

These federalism concerns are particularly acute when the States have chosen to exercise their traditional police powers to label someone a "felon." This classification represents the States' most severe assessment of criminal conduct and is reserved for those individuals whom the States believe pose the highest degree of danger to their citizens. Although some States may differ as to whether individuals found in possession of cocaine or marijuana fall within this category, Congress has decided to give effect to each State's policy decision, the objective of which is to protect its citizens from the dangers it believes are posed by a certain category of criminals.

STATEMENT

In 1988, Congress amended the Immigration and Nationality Act ("INA") to define a new class of aggravated felonies to determine the immigration consequences for aliens convicted of criminal offenses. Pub. L. No. 100-690, 102 Stat. 4181 (1988). The Federal Sentencing Guidelines similarly rely upon aggravated felonies to determine recommended sentence enhancements for some federal crimes. U.S.S.G. §2L1.2 (b)(1)(c).

The competing interpretations advanced by the parties as to which offenses Congress intended to be included as aggravated felonies can be distilled into two approaches: (1) the State Felony approach, which would give effect to a State's felony classification,

even if not mirrored by federal law, and (2) the Federal Felony approach, which would treat a state conviction as an aggravated felony only if the conviction would have been a felony under federal law. A brief description of the relevant federal statutes sheds additional light on these two approaches.

Under the Federal Sentencing Guidelines, aggravated felonies provide a baseline for sentencing enhancement:

> If the defendant previously was deported, or unlawfully remained in the United States, after a conviction for an aggravated felony, increase by 8 levels. U.S.S.G. §2L1.2 (b)(1)(c).

Under the INA, commission of an aggravated felony subjects an alien to deportation and also makes him ineligible for suspension of deportation and other equitable remedies available to other aliens. 8 U.S.C. §§1227(a)(2)(A)(iii) (deportation); 1229b (cancellation of removal); 1158(b)(2)(B) (ineligibility for asylum); 1229c(a)(1) (disqualification for voluntary departure).

Aggravated felonies serve distinct purposes in the Guidelines and the INA. Nonetheless, their definitions merge when the Guidelines define an aggravated felony by reference to the INA:

> For purposes of subsection (b)(1)(c), "aggravated felony" has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction for the aggravated felony. U.S.S.G. §2L1.2, comment. (n.2).

The INA, in turn, directs the reader to the federal criminal code, but first qualifies its definition by explicitly including state-law offenses:

> [T]he term "aggravated felony" means illicit trafficking in a controlled substance (as defined in section 802 of Title

> 21), including a drug trafficking crime (as defined in section 924(c) of Title 18). 8 U.S.C. §1101(a)(43)(B).
>
> The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal *or State law*. . . . 8 U.S.C. §1101(a)(43) (emphasis added).

Because the INA includes a "drug trafficking crime" as an aggravated felony, this dispute centers around the federal criminal code's definition of a drug-trafficking crime as:

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*). 18 U.S.C. §924(c)(2).

This provision concerns sentencing enhancement for defendants carrying a firearm during a drug-trafficking crime. *Id.* §§924(c)(1); 924(c)(5). The Controlled Substances Act, which §924(c)(2) specifically incorporates, defines a felony as "any Federal *or State* offense classified by applicable Federal *or State law* as a felony." 21 U.S.C. §802(13) (emphases added).

Thus, under the Federal Felony approach, courts classify state-law convictions as drug-trafficking crimes only if the underlying offense "would be punishable as a felony under the federal Controlled Substances Act." *Gerbier v. Holmes*, 280 F.3d 297, 299 (CA3 2002). Under the State Felony approach, courts interpret a drug-trafficking crime as encompassing "two separate elements: (1) that the offense be punishable under the Controlled Substances Act . . .; and (2) that the offense be a felony" under either state or federal law. *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364 (CA1 1996).

SUMMARY OF THE ARGUMENT

Our Nation must secure its borders, especially against convicted felons who enter illegally. National security and the rule of law require no less. Federal law therefore imposes serious penalties upon previously adjudged felons who choose to enter the country illegally. And that federal law should in turn be read to incorporate the standards of the prior state-law convictions, and to respect the policy judgments of state legislatures that have proscribed certain conduct as felonious.

To the maximum extent possible, federal law should be presumed to incorporate preexisting state-law standards. In support of the State Felony approach, the *amici* States set forth practical and structural reasons why Congress reasonably elected to incorporate state-law felony classifications into federal-law determinations concerning sentencing enhancement and immigration.

The first reason is comity. The State Felony approach effectuates the States' policy judgments to classify as felonies the crimes they consider to be the most serious within their jurisdictions. It therefore furthers the important interests of comity and cooperative federalism.

The second reason is efficiency. The Federal Felony approach requires federal courts to expend considerable judicial resources in performing a detailed comparative analysis of the state conviction and any potentially analogous federal offenses. This analysis can entail examination of state law at the time of the conviction as well as the state-court record, including transcripts, indictments, and plea agreements. The State Felony approach, in contrast, avoids this fact-intensive inquiry by simply deferring to the State's felony classification, which is evident on its face.

Because significant disparities in outcomes already inhere in our system of criminal adjudication, the State Felony approach's

advantages of comity and efficiency outweigh any marginal decrease in uniformity that might result. These considerations reasonably led Congress reasonably to select the State Felony approach instead of the Federal Felony approach.

ARGUMENT

I. CONGRESSIONAL INCORPORATION OF STATE LAW SHOULD BE PRESUMED TO BE COMPLETE.

When Congress chooses to incorporate state law, courts should presume that federal law absorbs state law in its entirety, absent unambiguous evidence to the contrary. For example, in *Robertson v. Wegmann*, 436 U.S. 584, 592-93 (1978), the Court held that, because 42 U.S.C. §1988 incorporates state law, courts must apply that state law in its entirety unless inconsistent with federal law or the Constitution. This approach makes sense. Courts should not expect Congress to speak to each individual aspect of the state law that is incorporated.

Of course, Congress is free to include or exclude specific portions of state laws from federal law as it desires. But if Congress makes a general incorporation, courts should presume it is complete. This approach obviates guesswork as to Congress's intent while affording proper respect to States' policy decisions. *Lehman Bros. v. Schein*, 416 U.S. 386, 393-94 (1974) (Rehnquist, J., concurring) (recognizing the importance of cooperative federalism and comity in our federal system). Accordingly, to the maximum extent possible, federal law should be presumed to incorporate preexisting state-law standards.

In the instant cases, federal law expressly and repeatedly refers to and incorporates state law. As with all statutory interpretation, the text should of course be the touchstone for the Court, and the parties will no doubt devote considerable energy to making the careful textual and structural analysis necessary to demonstrate the

proper reading of "aggravated felony." Rather than rehash those textual arguments, and the legislative history on either side, the *amici* States will instead focus on two overarching legislative interests that underlay Congress's reasonable choice to incorporate state-law definitions of "felony."

II. THE MOST REASONABLE READING OF THE FEDERAL LAW AT ISSUE IS THAT CONGRESS CHOSE THE STATE-FELONY APPROACH BECAUSE IT ADVANCES IMPORTANT FEDERAL INTERESTS IN EFFICIENCY AND COMITY.

A. The State Felony Approach Is More Efficient Than the Federal Felony Approach and Would Respect States' Policy Decisions Regarding the Severity of Crimes Committed Within Their Jurisdictions.

The State Felony approach gives effect not only to state convictions but also to the States' policy determinations to treat certain crimes as felonies.[1] By respecting States' normative judgments, the State Felony approach advances comity and "cooperative federalism," which are important considerations "inherent in a federal system," *Lehman Bros.*, 416 U.S., at 393-94 (Rehnquist, J., concurring).

Concerns about comity are especially appropriate in the criminal-justice arena. Traditionally, the States have assumed the primary role in administering criminal justice. *Abbate v. United States*, 359 U.S. 187, 195 (1959) ("The States under our federal

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1. Deference can be given to the States' felony classification by either (1) adopting a State's designation of an offense as a felony, or (2) considering as a felony any conviction for which the maximum term of imprisonment under state law was more than one year, *see generally* Br. of United States.

system have the principal responsibility for defining and prosecuting crimes."); *see also Screws v. United States*, 325 U.S. 91, 109 (1945) (noting that federal system places administration of criminal justice with States except as Congress may exercise its delegated powers to create federal offenses); *Jerome v. United States*, 318 U.S. 101, 104-05 (1943) (same). And States process the lion's share of the nation's criminal offenders. *See* 1 WAYNE R. LAFAVE *ET AL.*, CRIMINAL PROCEDURE §1.2(b) (1999 & Supp. 2005) (arguing that the federal criminal justice system is a "bit player" compared to the States).

States have also played an important role in immigration regulation. One commentator has described immigration law in the first century of our country's history as "a complex hybrid of state and federal policy":

> Federal decision-makers validated certain local policies. [] Supreme Court Justices assigned some categories of immigration regulation to state police power in language that indicated approval rather than indifference; and the Executive urged foreign governments to respect policies whose only statutory embodiment was in state law. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1896-97 (1993).

In light of this situation, Congress's choice of the State Felony approach was eminently reasonable as the scheme that would best advance the "important considerations" of comity and cooperative federalism. *Lehman Bros.*, 416 U.S. at 393-94 (Rehnquist, J., concurring).

There is an even more practical consideration that undergirds the reasonableness of Congress's choice to employ the State Felony approach: conservation of judicial resources. Under the Federal Felony approach, courts must undertake a detailed comparative

analysis of the respective criminal codes to ascertain whether the state conviction would warrant felony treatment under federal law. *See generally* Wayne A. Logan, *Horizontal Federalism in the Age of Criminal Law Interconnectedness*, 154 U. PA. L. REV. 257, 269 (2005) (discussing States' treatment of convictions from other jurisdictions).

In contrast, under the State Felony approach, courts give dispositive effect to the State's felony characterization, avoiding the difficult case-by-case comparative analysis characterizing the Federal Felony approach.[2]

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2. Of course, that state-defined "felonies" would be deemed felonies under the federal immigration laws does not necessarily imply the obverse. Indeed, the State Felony approach is altogether compatible with concluding that state misdemeanors that would themselves constitute felonies under the federal statutes listed in §924(c)(2) will also constitute aggravated felonies under federal immigration law. 8 U.S.C. §1101(a)(43)(B). Thus, courts may possibly be required to analyze state misdemeanor convictions to determine whether they would be treated as felonies under federal law. This policy decision by Congress could well be seen as a compromise between the interests of comity and efficiency and Congress's desire to be increasingly comprehensive in imposing criminal and immigration sanctions, *see e.g.* H.R. Conf. Rep. No 101-955, at 132 (1990), reprinted in 1990 U.S.C.C.A.N. 6784, 6797 (stating that purpose of Immigration Act of 1990 was to broaden list of "serious crimes." with immigration consequences), coupled with its desire to impose greater sanctions than States may have chosen for certain crimes, *cf.* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1457 (2005) (describing the enactment of the Lautenberg firearms ban, which extended federal gun control laws to individuals convicted of misdemeanor domestic abuse because of concern that many States did not punish domestic abusers as felons).

The analysis required by the Federal Felony approach can prove very difficult given the complexity of modern criminal codes, with outcomes turning on such questions as whether there is a federal-law analog to a particular state offense, and, if so, whether the elements of each offense are sufficiently similar. This "requires adjudicators to engage in an often-convoluted hypothetical analysis that can be difficult to apply in practice." *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 397-98, 2002 WL993589 (B.I.A. 2002). Moreover, the task is further complicated by the need to identify and construe the state criminal law in effect when the predicate conviction was obtained, which could require review of hard-to-find historic criminal codes. Logan, 154 U. PA. L. REV., at 271. The analysis could conceivably extend to examining the propriety of the state conviction itself. *Cf. Gerbier*, 280 F.3d, at 316-17 (analyzing whether state drug conviction was accompanied by procedural safeguards equivalent to those that would have been provided in federal court when used in sentence enhancement).

To determine whether a particular state conviction would have qualified as a federal felony, courts may also be required to examine the evidentiary record, such as accusatory instruments and plea transcripts. "This evaluative task itself can be quite difficult because the records supporting pleas or convictions (themselves often aged) are frequently ambiguous or incomplete." Logan, 154 U. PA. L. REV., at 272. In the comparable context of interstate analyses, New York's highest court has opined, "[d]etermining whether a particular out-of-State conviction is the equivalent of a New York felony may involve production and examination of foreign accusatory instruments and, conceivably, the resolution of evidentiary disputes, all in the context of comparisons with the law of other jurisdictions." *People v. Samms*, 731 N.E.2d 1118, 1122 (N.Y. 2000). This case presents a prime example of this burdensome inquiry: whether Lopez's conviction for possession of cocaine would have been a felony under federal law is unclear from

the face of the record because the state court documents do not reveal the form or amount of the cocaine, upon which the federal-felony classification would depend. Gonzales Resp. Br., at 4 n.3.

States are familiar with the choice Congress confronted between the Federal Felony and State Felony approaches. In applying their own recidivist sentencing regimes, States themselves had to decide how to account for prior convictions from other jurisdictions. Twenty-eight States employ systems similar to the Federal Felony approach, which requires substantive analysis of the other State's conviction to determine whether it satisfies the forum State's sentencing enhancement scheme. Logan, 154 U. PA. L. REV., at 269. Twenty-one States (and the District of Columbia) use an analog to the State Felony approach when assessing convictions from other jurisdictions. *Id.*, at 277. Under this approach, dispositive importance attaches to how the other jurisdiction treated the earlier conviction. If it was a felony in the convicting jurisdiction, the forum State will consider it for enhancement, even if the offense would not have been a felony in the forum State and thus would not trigger enhancement if it had been committed there. *Id.* The fact that a significant number of States have chosen the analog to the State Felony approach supports the conclusion that Congress's decision to select that same approach was eminently reasonable and appropriately reflective of comity and cooperative federalism.

B. Any Marginal Decrease in Uniformity That the State Felony Approach Might Cause Is Outweighed by Its Substantial Efficiency and Comity Advantages.

The principal criticism of the State Felony Approach is that its reliance on differing state laws can lead to disparate outcomes for individuals who engaged in similar conduct. For example, a defendant convicted of a felony under state law for conduct that would have been a misdemeanor under federal law would be

considered an aggravated felon, whereas a defendant convicted for the same conduct, but in a State that considered such conduct a misdemeanor, would not be treated as an aggravated felon.

Petitioners and their *amici* argue that Congress cannot have intended such disparate results. *E.g.* Toledo-Flores Br., at 39-41; Lopez Br., at 33-36. But the ideal of uniformity that these parties attribute to Congress does not reflect the realities of criminal adjudication in our country.

Diverse outcomes inhere in our system of criminal adjudication. Mikos, 90 CORNELL L. REV., at 1428 & n.48. This occurs in part because all criminal convictions—whether state or federal—result from multiple discretionary decisions made by prosecutors, defendants, and juries. The most obvious example of similarly situated defendants receiving different outcomes is when two co-defendants are charged with the same crime, and one makes a plea bargain with prosecutors while the other is tried before a jury. Disparate results—as to the crime for which each defendant is convicted and the punishment each defendant receives—are virtually guaranteed in this instance.

Prosecutors exercise great discretion when making charging and plea-bargaining decisions. Various factors influence these decisions, including allocation of scarce prosecutorial and investigative resources and the desire to ensure that the punishment fits the crime.[3] These factors take on heightened importance in circumstances—such as immigration—where a state conviction can

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3. Prosecutors have a duty "to seek justice, not merely to convict." Standards for Criminal Justice 3-1.2(c) (3d ed. 1993), available at WL SCJ 3-1.2; *see also* National Prosecution Standards §§43.6, 44.4, 68.1 (Nat'l Dist. Attorneys Ass'n, 2d ed. 1991) (encouraging prosecutors to consider the collateral consequences of conviction when making charging decisions).

lead to a supplemental federal sanction such as deportation. *See generally* Mikos, 90 CORNELL L. REV., at 1422-32.

Because the potential federal sanction of deportation is a significant consideration for an alien defendant, he may be less likely to accept a plea bargain that would subject him to that penalty. Conversely, prosecutors do not have the resources to try every case, and they may believe that the supplemental federal sanction is too harsh a punishment for the defendant's conduct. Thus, prosecutors have an incentive to offer such defendants plea bargains for lesser offenses than their conduct might ordinarily warrant. *Id.*, at 1426-27.

These factors may affect hundreds of thousands of cases every year. In 2003 alone, almost 80,000 aliens were deported because of criminal convictions, and most of these crimes were prosecuted by the States. *Id.*, at 1413. Moreover, drug crimes—like those at issue here—account for almost half of all criminal alien deportations. *Id.*, at 1445 & n.96. Therefore, the nature of our system of criminal enforcement—especially when aliens are accused of drug crimes—means that similarly situated defendants would have experienced disparate outcomes regardless of whether Congress had adopted the State Felony Approach or the Federal Felony Approach.

Moreover, and fundamentally, two defendants who committed the same crime in different States that differ as to the felony status of that particular conduct are not similarly situated: one is a felon, and the other is not. That is a distinction with consequence—and one on which the state legislatures can legitimately disagree—and it is altogether reasonable for Congress to give federal force and effect to state-law felony convictions, even if the conduct may not have been a felony in other States.

In other words, when Congress decided to adopt a statutory scheme that based current punishment on past state and federal convictions, it necessarily accepted the potential for heterogeneous

results intrinsic to the criminal adjudicatory system. Given this acquiescence, it would be unreasonable to assume that Congress rejected the State Felony approach because it introduced some added potential for disparate results. Congress reasonably decided to trade a marginal decrease in uniformity[4] for the considerable advantages in efficiency and comity afforded by the State Felony approach. *See* Part I.A., *supra*.

Adjudicating a criminal defendant as a felon is one of the most portentous determination a State can make. Congress reasonably chose to respect those state-law determinations, and to enact severe penalties to prevent the illegal immigration of aggravated felons. This Court should give force that congressional decision, and accordingly hold that individuals adjudged felons by state law are subject to the full penalties of federal immigration law.

CONCLUSION

The Court should affirm the judgments below.

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4. Congress's incorporation of state law in this context does not violate Article I, §8 of the Constitution. *See* U.S. CONST., art. I, §8 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."). The Court has upheld a federal bankruptcy provision that defined exempt assets with reference to state law. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902). The Court described the uniformity requirement as "geographical" not "personal" and held that "[t]he general operation of the law is uniform although it may result in certain particulars differently in different states. *Id.*, at 190. The same result applies here.

Respectfully submitted,

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No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Immigration and Nationality Act attaches a variety of immigration consequences to an alien's commission of an "aggravated felony," 8 U.S.C. § 1101(a)(43). In particular, if Petitioner Lopez's conviction for violation of a South Dakota felony statute constitutes an "aggravated felony," Lopez – who concedes that his conviction renders him deportable from the United States – is ineligible to apply for cancellation of removal, *see* 8 U.S.C. § 1229b(a)(3) and (b)(1)(C). The question presented is:

Whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the federal Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony," where the alien was sentenced under State law to more than one year of imprisonment.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. See, e.g., *Clark v. Martinez*, 543 U.S. 371 (2005); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005); *Demore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999); *Al Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to deport aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, despite the clear intent of Congress that such alien felons be deported as quickly as possible, *amici* are concerned that courts and administrative judges have permitted the pace of deportations to slow to a crawl. *Amici* are filing a brief in this case because they believe that the rights of the public to be protected from the threat posed by dangerous alien felons outweigh whatever rights such felons may have to avoid removal.

STATEMENT OF THE CASE

Petitioner Jose Antonio Lopez is a citizen of Mexico who entered the United States illegally in 1985 or 1986.[2] In 1997, Lopez was indicted in South Dakota state court on serious drug charges: one count of possessing cocaine, one count of distributing cocaine, and one count of conspiracy to distribute cocaine. In September 1997, Lopez pleaded guilty to a felony under South Dakota law: aiding and abetting the possession of a controlled substance (cocaine), in violation of S.D. Codified Laws §§ 22-42-5, 22-6-1(7) (Michie 1988). *See* Pet. App. 2a. He was sentenced to five years incarceration and served 15 months.[3]

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[2] In 1990, he adjusted his status to that of lawful permanent residence. There is evidence suggesting that Lopez obtained that change in status through fraud. However, the fraud issue is not before the Court.

[3] Five years was the maximum permissible sentence in 1997; (continued...)

The Immigration and Naturalization Service (INS) placed Lopez in removal proceedings in April 1998, while he was still serving his prison sentence. Lopez conceded that he was deportable based on his criminal conviction. *Id.* 12a-16a; *see* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). He insisted, however, that his felony conviction was not an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43), and thus that he was eligible to seek cancellation of removal under 8 U.S.C. § 1229b(a).[4]

In his November 2002 decision, the Immigration Judge (IJ) disagreed. Pet. App. 10a-20a. The IJ held that Lopez's crime was a "drug trafficking crime" under Eighth Circuit precedent, and as such qualified as an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(B). *Id.* 17a. The IJ said that that holding was unaffected by the fact that at the time of Lopez's conviction the Board of Immigration Appeals (BIA) adhered to a position that only those State-law felony drug convictions that would have been felonies under the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801 *et seq.*, could qualify as "aggravated felon[ies]." The IJ noted that the BIA later reversed that position; he determined that Lopez did not act in reliance on the former BIA position at the time he pleaded guilty, nor could he reasonably have done so. *Id.* 17a-18a. Accordingly, the IJ held that Lopez was ineligible for cancellation of removal, and he ordered Lopez removed to

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[3](...continued)
South Dakota has since amended its law to increase the maximum sentence to 10 years.

[4] Permanent resident aliens are not eligible for cancellation of removal if they have "been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

Mexico. *Id.* 20a. Adopting the IJ's reasoning, the BIA dismissed Lopez's appeal in May 2003. *Id.* 8a-9a.

Lopez thereafter sought relief in the Eighth Circuit, which affirmed in August 2005. *Id.* 1a-7a. The appeals court held that a "drug trafficking crime" is one that would be punishable under the CSA and would qualify as a felony under either State or federal law. *Id.* 4a. The court held that Lopez's conviction met that standard – the conduct to which Lopez admitted unquestionably was punishable under the CSA and was a felony under South Dakota law – and thus qualified as an "aggravated felony" that precluded an application for cancellation of removal. *Id.* 5a. The court rejected Lopez's claim that the BIA was acting improperly by "retroactively" applying to Lopez's case a rule that it did not adopt until five years after Lopez's conviction. The court said that there was nothing retroactive about the ruling, given that the Eighth Circuit's interpretation of "drug trafficking crimes" had been settled law within the circuit for several months by the time of Lopez's guilty plea. *Id.* 6a-7a.

This Court granted Lopez's certiorari petition on April 3, 2006, to resolve a conflict among the circuit courts regarding when a drug crime committed by an alien constitutes an "aggravated felony."

SUMMARY OF ARGUMENT

Lopez's felony offense should be deemed a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c) and thus an "aggravated felony" under 8 U.S.C. § 1101(a)(43). A "drug trafficking crime" is defined as "any felony punishable under the [CSA]." 18 U.S.C. § 924(c)(2). The crime for which Lopez was convicted was a felony under South Dakota law, punishable by up to five years in prison.

Lopez also concedes that his conduct was punishable under the CSA. Accordingly, applying the ordinary meaning to the words of § 924(c)(2), Lopez committed an "aggravated felony" that bars him from seeking cancellation of removal.

Lopez's alternative construction – that only those offenses that are proven felony violations of the CSA are "drug trafficking crime[s]" and thus "aggravated felon[ies]" – has little to recommend it. At the same time that Congress expanded the definition of "aggravated felony" to include any "drug trafficking crime," it added a specific admonition that the term "aggravated felony" should be applied to any offense so described, regardless whether the offense was "in violation of Federal or State law." 8 U.S.C. § 1101(a)(43). In light of that admonition, there can be little basis for concluding that Congress – without ever saying so – intended to adopt an unnaturally restrictive definition of the "felon[ies]" that could qualify as drug trafficking crimes. Moreover, Lopez's construction would exclude from the definition of "aggravated felony" all State-law drug felony convictions – even those that could have been prosecuted as felony violations of the CSA – unless the conviction independently meets the definition of "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1101(a)(43)(B). At least some felony violations of the CSA arguable would not meet that definition.

There is nothing disproportionate about ordering the removal of an alien who has been convicted of a State-law drug felony and sentenced to five years in prison. For the past 18 years, Congress has regularly expressed its view that aliens adjudged by a criminal court (whether federal or State) to have committed a major crime should be removed, without regard to claimed extenuating circumstances. In this case, Lopez was indicted for distributing, and conspiracy to distribute, cocaine.

Prosecutors clearly deemed him a major criminal: they agreed to drop the distribution and conspiracy charges only after Lopez agreed to plead guilty to another felony drug charge. It is precisely such individuals that Congress had in mind when it took steps designed to ensure that alien felons are swiftly removed from the country.

There is no merit to Lopez's contention that giving effect to South Dakota's determination that Lopez is a major criminal results in an unwarranted non-uniform application of federal immigration law. To the contrary, the Eighth Circuit's decision mandates a uniform application: aliens are subject to removal as aggravated felons if they have been convicted of enumerated major violations of federal or State criminal law, regardless where in the country they are now located. Congress recognized, of course – when it included State felony convictions within the definition of "aggravated felony" – that criminal law varies from State to State. But the rule it adopted is uniformly applicable: aliens must conform their conduct to the laws of the State in which they live or suffer the consequences.

Also without merit are Lopez's attempts to invoke various rules of statutory construction to bias the interpretation of "drug trafficking crime" in his favor. Lopez asserts that ambiguous statutes touching on deportation/removal should be construed to favor the alien resisting deportation. To the contrary, the guiding principle in construing an immigration statute or any other federal statute ought to be to arrive at an interpretation that best captures congressional intent. In light of Congress's repeated efforts to expand the list of "aggravated felon[ies]" that render an alien felon subject to automatic deportation, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien felon. The rule of statutory

construction relied on by Lopez – which is quite limited in nature and which has never been embraced as an actual holding of the Court – has no application here.

Similarly misplaced is Lopez's reliance on "the rule of lenity." That rule has been applied only in criminal cases, not to civil cases such as immigration proceedings. The rule of lenity is based on the notion that individuals have a due process right not to face criminal sanctions for their conduct unless they had clear advance notice that their conduct was proscribed by the criminal law. The rule of lenity interprets ambiguous criminal statutes against the prosecution based on the understanding that a contrary interpretation would apply criminal sanctions to conduct not clearly proscribed. There can be no argument that Lopez lacked fair warning either that his conduct was felonious or was a deportable offense. Lopez's alternative argument – that the rule of lenity should be invoked because the question presented in this case could have direct application in criminal cases involving 18 U.S.C. § 924(c) – is also without merit. There can be no such application, because sentence enhancement under § 924(c) cannot be based on a conviction in State court.

ARGUMENT

I. LOPEZ'S FELONY OFFENSE IS A "FELONY PUNISHABLE UNDER THE CONTROLLED SUBSTANCES ACT"

For at least 20 years, Congress repeatedly has expressed its displeasure over the slow rate at which alien felons have been removed from this country. *See, e.g.*, H. Rep. No. 109-345(I) (Dec. 13, 2005). Although federal law has long provided that all but the most minor criminal convictions render an alien deportable, provisions in the law permitting

alien felons to plead extenuating circumstances as a reason to avoid deportation have made it exceedingly difficult for immigration authorities to remove even the most hardened criminals from the country.

Among the steps taken by Congress to overcome the difficulty in removing alien felons has been adoption of legislation – beginning in 1988 – that has steadily increased the number of offenses for which deportation is *automatic.* Congress has provided that resident aliens, such as Lopez, who are subject to deportation are ineligible for "cancellation of removal" under 8 U.S.C. § 1229b(a) if they have "been convicted of an aggravated felony." 8 U.S.C. § 1229b(a)(3). The definition of "aggravated felony" has been expanded on numerous occasions since 1988, so that it now encompasses 21 categories of federal and State crimes, including such broad categories as "any crime of violence . . . for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(F).

At issue here is whether Lopez's felony drug conviction falls within one of those 21 categories: "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). A "drug trafficking crime" is defined in § 924(c)(2) as "any felony punishable under the [CSA]" or two other federal drug laws. Accordingly, if Lopez's crime is a "felony punishable under the [CSA]," he has committed an "aggravated felony" and thus is rendered ineligible for cancellation of removal by virtue of 8 U.S.C. § 1229b(a)(3).[5]

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[5] Lopez concedes that he is deportable under 8 U.S.C. § 1227(a)(2)(B)(i) by virtue of having been convicted of a drug crime.

If one construes § 924(c)(2) based on the ordinary meaning of the words used in that statute, Lopez committed an aggravated felony that bars him from seeking cancellation of removal. The most logical reading of § 924(c)(2) is that one has committed a "drug trafficking crime" if one has been convicted of a felony in any State or federal court and one's crime is a "punishable under the [CSA]." Lopez meets both of those conditions. The crime of which Lopez was convicted – S.D. Codified Laws §§ 22-42.5, 22-6-1(7) (Michie 1988) – was a felony under South Dakota law, punishable by up to five years imprisonment. Moreover, Lopez concedes that his crime was "punishable under the [CSA]."

A. Lopez's Previously Expressed Interpretation of § 924(c)(2) Is Without Merit

In the appeals court, Lopez argued that § 924(c)(2) limits "drug trafficking crimes" to those crimes that would be deemed felonies under the CSA itself. Pet. App. 4a. He argued that his crime did not meet that definition because, although it was a felony under South Dakota law, it would not have been punishable as a felony under the CSA. *Id.*[6] That reading of § 924(c)(2) cannot be squared with the words of the statute. If that had been Congress's intent, it is far more plausible that Congress would have drafted the statute to read, "a crime punishable as a felony under the CSA." But contrary to that hypothetical language, nothing in § 924(c)(2) suggests that Congress intended to limit "drug trafficking crime[s]" to a subset of offenses punishable under the CSA. Rather, the statutory language can only be read to mean that *any* felony

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[6] That interpretation is the one adopted by several federal appeals courts and by the Board of Immigration Appeals in 1992. *See In re Davis*, 20 I. & N. Dec. 536 (BIA 1992). The BIA later abandoned that view. *See In re Yanez*, 23 I. & N. Dec. 390, 397 (BIA 2002).

"punishable under the CSA" qualifies as a "drug trafficking crime."

Moreover, the interpretation espoused by Lopez in the appeals court creates difficult line-drawing issues. Under the interpretation accepted by the Eighth Circuit, it will usually be a straight-forward matter to determine whether the alien's drug conviction is deemed a "felony" in the State in which he was convicted. In contrast, if only a subset of such felony convictions qualify as drug trafficking crimes, it may often be difficult to determine which of the hundreds of potentially applicable State-law felonies include all the elements of a crime punishable as a felony under the CSA.

B. Lopez's Current Interpretation of § 924(c)(2) Is Without Merit

Lopez has adopted a new interpretation of § 924(c)(2) before this Court. He now asserts that an offense qualifies as a "drug trafficking crime" only if the offender has actually been charged and convicted of a felony violation of the CSA. Pet. Br. 20-27. It is not sufficient, in his view, to demonstrate that the offender has been convicted of a State-law felony, even if the crime could also have been prosecuted as a felony under the CSA. *Id.* Lopez's new position cannot be squared with § 924(c)(2)'s use of the word "punishable," which denotes an offense that is *subject to* punishment under the CSA – not one that has already resulted in federal charges and conviction under the CSA. *See, e.g.*, www.dictionary.reference.com/browse/punishable ("punishable" means "liable to or deserving punishment" or "subject to punishment by law"). Conviction in State court on criminal drug charges that are analogous to an offense under the CSA is *per se* evidence that one's offense is "punishable under the [CSA]."

Moreover, Lopez's interpretation is inconsistent with the history surrounding Congress's adoption of the relevant statutes. At the same time that Congress expanded the definition of "aggravated felony" to include "any drug trafficking crime," it added to 8 U.S.C. § 1101(a)(43) an explicit admonition that the term "aggravated felony" should be applied to any offense described in § 1101(a)(43), regardless whether the offense was "in violation of Federal or State law." Pub. L. No. 101-649 § 501, 104 Stat. 4978, 5048 (1990). In light of that admonition, there can be little basis for concluding that Congress – without saying so – intended to adopt an unnaturally restrictive definition of the "felon[ies]" that could qualify as drug trafficking crimes.[7]

Furthermore, Lopez's construction would exclude from the definition of "aggravated felony" all State-law drug felony convictions – even those that could have been prosecuted as felony violations of the CSA – unless the conviction independently meets the definition of "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1101(a)(43)(B). At least some felony violations of the CSA (*e.g.*, manufacture of a controlled substance) arguably would not meet that definition.

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[7] Congress did not, of course, write § 924(c)(2) in 1990 when it expanded § 1101(a)(43)'s definition of an aggravated felony; § 924(c)(2) was already in the statute books. But one must assume that when, in 1990, Congress for the first time tied the definition of an "aggravated felony" to a term contained in § 924(c)(2), it intended that courts would adopt the ordinary meaning of the words contained in § 924(c)(2) when deciding whether an offense was an "aggravated felony." Congress's simultaneous adoption of the "in violation of Federal or State law" language indicates that Congress understood the word "felony" in § 924(c)(2) to refer to conduct in violation of either federal or State law.

Even if one accepted Lopez's view that all felony violations of the CSA and analogous State-law drug crimes would qualify as "illicit trafficking in a controlled substance," that interpretation does not support Lopez's argument that Congress intended to exclude all State-law drug convictions from the term "any felony punishable under the [CSA]." Lopez argues that if "Congress had understood that the definition of 'drug trafficking crime' in section 924(c) includes state drug trafficking crimes, it would not have needed to adopt an additional provision providing generally that 'illicit trafficking' is an aggravated felony." Pet. Br. 33. But whether a statutory provision is absolutely "necessary" to achieve a congressional purpose has little or no bearing on how that provision should be interpreted. There is nothing at all unusual about Congress adopting provisions whose sole object is to add emphasis to Congress's intended purpose.

C. Deportation Is Not a Disproportionate Penalty for Lopez's Crime

The United States's brief thoroughly explains why Lopez should be deemed to have committed an aggravated felony. Rather than repeat all those arguments here, *amici* wish to focus on several additional points.

First, Lopez argues that deportation is disproportionate to his crime. To the contrary, there is nothing disproportionate about ordering the removal of an alien who has been convicted of a State-law drug felony and sentenced to five years in prison. For the past 18 years, Congress has repeatedly expressed its view that aliens adjudged by a criminal court (whether federal or State) to have committed major crimes should be removed, without regard to claimed extenuating circumstances. In 1988, Congress defined a relatively narrow category of "aggravated felon[ies]" – it included offenses such

as murder, drug trafficking crimes, and firearms trafficking offenses – and provided that an alien who committed an aggravated felony was subject to automatic deportation. *See* Anti-Drug Abuse Act of 1988, §§ 7342, 7344, 102 Stat. 4469, 4470. Since 1988, "Congress has frequently amended the definition of aggravated felony, broadening the scope of offenses which render an alien deportable." *Leocal v. Ashcroft*, 543 U.S. 1, 4 n.1 (2004).[8]

Lopez and his amicus supporters may view his deportation as a disproportionate response to his felonious conduct, but nothing in its actions over the past 18 years suggests that Congress shares that view. Indeed, many of the offenses included in 8 U.S.C. § 1101(a)(43)'s list of aggravated felonies are not federal crimes at all. Accordingly, in deciding which aliens should be subject to automatic deportation, Congress has demonstrated its willingness to accept the judgment of State officials that an alien has engaged in serious criminal misconduct, even when (unlike in Lopez's case) the alien's conduct has contravened no federal law.

Second, Lopez argues that his conduct does not meet common understandings of the word "trafficking," and thus that he should not be deemed to have committed a drug trafficking crime. Pet. Br. 20. Whether Lopez is correct regarding common usage of the word "trafficking" is beside the point, given that when Congress specified in § 1101(a)(43)(B) that a "drug trafficking crime" is an

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[8] *See, e.g.*, Immigration Act of 1990, § 501, 103 Stat. 4978, 5048 (1990); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4305 (1994); Antiterrorism and Effective Death Penalty Act of 1966, § 440(e), 110 Stat. 1277 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996).

"aggravated felony," it provided its own detailed definition of what constitutes a "drug trafficking crime." In construing the term "drug trafficking crime," one should rely on the definition provided by Congress, not on how individuals might interpret the term in the absence of a statutory definition.

Finally, the Court should not permit Lopez to get away with portraying himself as anything other than a serious drug offender. Lopez is attempting to take advantage of the fact that prosecutors agreed to drop the most serious charges lodged against him – distributing cocaine and conspiracy to distribute cocaine – in return for his agreement to please guilty to another drug felony. What Lopez fails to note is that prosecutors agreed to drop the distribution and conspiracy charges with knowledge that in return they were obtaining a conviction on charges that South Dakota deemed extremely serious, and that led to imposition of a five-year prison sentence. Despite Lopez's effort to portray himself as a mere drug possessor who had the bad luck to be prosecuted in South Dakota instead of in a State with less harsh drug laws, he has provided no evidence that prosecutors would ever have dropped the distribution and conspiracy charges in the absence of his agreement to plead guilty to a serious felony. And as noted above, Congress has made abundantly clear that aliens who commit serious felonies should be subject to automatic deportation, regardless whether the conviction arises in federal or State court. Congress provided that aggravated felonies include "any felon[ies]" punishable under the CSA; now that the South Dakota courts have found Lopez guilty of a drug felony, he should not be permitted to second-guess that determination simply because prosecutors agreed to drop even more serious felony charges.

II. THE DECISION BELOW DOES NOT RESULT IN UNWARRANTED NON-UNIFORM APPLICATION OF FEDERAL IMMIGRATION LAW

Lopez also argues that the decision below results in unwarranted non-uniform application of federal immigration law. Pet. Br. 33-36. Lopez asserts, "The policy favoring uniform application of the immigration laws supports an interpretation that makes similarly situated noncitizens subject to the same rules for asylum." *Id.* 34.

Lopez's argument is without merit. The decision below subjects Lopez to the same immigration rules as every other deportable alien: all such aliens are ineligible for cancellation of removal under 8 U.S.C. § 1229b or asylum under 8 U.S.C. § 1158(b)(2)(B) if they have been convicted of an aggravated felony. *All* aliens nationwide are on notice that they may be subject to automatic deportation if they fail to conform their conduct to the penal code of the State in which they reside.

Lopez's argument is based on a misunderstanding of what this Court has meant by its rule of construction that Congress generally intends federal statutes "to have uniform nationwide application." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). The Court generally assumes that if A and B are identically situated except that they live in different States, Congress intends (in the absence of a plain indication to the contrary) that they will be identically treated under federal law. *Id.* 45. In other words, the application of federal law to A and B generally should not be deemed "dependent on state law." *Id.* 43 (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)). But A and B cannot be deemed to be similarly situated if A has been convicted of an aggravated felony while B has not. Under those circumstances, the two individuals have behaved

differently: B conformed his conduct to the penal code of his State, while A did not.

The inapplicability to this case of the uniformity principle set out in *Mississippi Band* is well illustrated by a comparison of the facts of the two cases. *Mississippi Band* involved the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.*, a federal statute that sought to discourage adoption or foster care placement of Indian children into non-Indian homes. The ICWA gives exclusive jurisdiction to tribal courts over custody proceedings involving Indian children "domiciled within" a tribe's reservation. Notwithstanding the ICWA, the Mississippi Supreme Court exercised jurisdiction over custody proceedings involving two Indian children; it did so by applying Mississippi's unusually narrow definition of "domicile." This Court reversed, ruling *inter alia* that Congress intended to apply a uniform definition of "domicile" for purposes of the ICWA. *Mississippi Band*, 490 U.S. at 47. The Court noted that allowing the issue of domicile to be determined by reference to State law would lead to a non-uniform rule and that identically situated litigants could face different results based solely on the State in which the court proceedings arose. Indeed, the Court noted, litigants could alter the outcome of the "domicile" question by moving their Indian child to a new State. *Id.* 45-46. The Court concluded, "Congress could hardly have intended the lack of nationwide uniformity that could result from state-law definitions of domicile." *Id.* 45.

The absence of any similarity between this case and *Mississippi Band* is readily apparent. Lopez is subject to automatic deportation as an aggravated felon without regard to his State of residence at the time of his deportation proceedings. Accordingly, his deportation does not create a situation even remotely akin to the "lack of nationwide

uniformity" that troubled the Court in *Mississippi Band*. Every State has its own penal code and its own list of crimes that qualify as "aggravated felon[ies]." But the immigration laws are not being enforced non-uniformly, in the sense at issue in *Mississippi Band*, so long as federal courts apply a uniform deportation standard in all cases involving an alien convicted of an aggravated felony under either State or federal law, a standard that does not vary based on the State of residence of the alien. Affirming the Eighth Circuit's decision would ensure just such uniformity.

Lopez contends that immigration law is somehow rendered non-uniform if an alien's conduct in one State constitutes an aggravated felony (and thus results in automatic deportation), while his same conduct in another State would be deemed blameless. But federal recognition of State-to-State variations in criminal law has never been held to create the type of non-uniform application of federal law that Congress is thought to eschew. Indeed, given its knowledge that penal statutes are not uniform nationwide, Congress must be deemed to have accepted the type of "non-uniformity" that Lopez decries, by providing in § 1101(a)(43) that the term "aggravated felony" applies to any of 21 broad categories of offenses – some of which do not constitute violations of federal law.

That Congress recognized and accepted the type of non-uniformity that Lopez decries is readily apparent from a perusal of the offenses enumerated in § 1101(a)(43). For example, "sexual abuse of a minor" is included within the definition of "aggravated felony," 8 U.S.C. § 1101(a)(43)(A), but State laws vary widely regarding the definition of a "minor." In Texas, it is a felony to have sexual contact with an individual under 17, if the perpetrator is at least three years older than the victim. Texas Penal Code § 22.011. In

Georgia, it is a felony to have sexual contact with an individual under 16. Ga. Code Ann., § 16-6-3. Accordingly, an alien who had consensual sexual contact with a 16-year-old in Texas could face serious felony charges and, if convicted, would be subject to automatic deportation; but the same conduct would have no immigration consequences if committed in Georgia.

Similarly, a conviction that "relates to the owning, controlling, managing, or supervising of a prostitution business" is deemed an aggravated felony. 8 U.S.C. § 1101(a)(43)(K)(i). In virtually all States, engaging in such conduct is a felony and thus could result in a criminal conviction and automatic deportation for an alien. In contrast, running a prostitution business is wholly legal in Nevada, provided that the operator is licensed by government officials. Nev. Rev. Stat. 244.345. Thus, an alien who runs a prostitution business in California faces automatic deportation if convicted, while he would face neither criminal nor immigration sanctions if he moved his business across the border into Nevada. Congress clearly was aware of such differences in State penal laws when it mandated automatic deportation for those who commit aggravated felonies and therefore cannot be deemed to have sought to avoid the type of "non-uniformity" to which Lopez objects.

In sum, there is no reason to believe that Congress would be troubled by the classification of Lopez's crime as an aggravated felony even though similar misconduct by aliens in some other States would not be so classified. The decision below provides for uniform application of the immigration laws in the only meaningful sense: all aliens nationwide are subject to automatic deportation if they fail to conform their conduct to the penal code of the State in which they live and the resulting conviction qualifies as an "aggravated felony."

III. THERE IS NO BASIS FOR INVOKING A PRESUMPTION THAT AMBIGUOUS STATUTES SHOULD BE CONSTRUED IN FAVOR OF AN ALIEN RESISTING DEPORTATION

Lopez attempts to invoke several alleged rules of statutory construction to bias the interpretation of "drug trafficking crime" in his favor. In particular, Lopez asserts that ambiguous statutes touching on deportation/removal should be construed in favor of the alien resisting deportation. Pet. Br. 36-37.

Lopez's efforts to invoke this alleged rule of statutory construction should be rejected for several reasons. First, the presumption relied on by Lopez should be invoked, if at all, only as a last resort in those cases in which normal rules of statutory construction fail to provide any basis for resolving the alleged ambiguity. Here, once those rules of statutory construction are applied, there is no remaining ambiguity. Second, no cases cited by Lopez embrace Lopez's presumption as a holding; in each case, the Court's discussion is dictum. Third, Lopez's presumption makes no sense as an accurate predictor of how Congress would want such issues resolved; to the contrary, all indications are that Congress would wish close cases to be resolved in *favor* of deportation.

The Presumption as a Last Resort. Lopez asserts that the presumption he seeks to invoke "favors Petitioner's construction of the statutory language and cuts against the interpretation of the court of appeals." *Id.* 36. But as this Court recently noted, that sort of argument "puts the cart before the horse." *Fernandez-Vargas v. Gonzales,* 126 S. Ct. 2422, 2430 (2006). The Court explained that any presumption favoring aliens facing deportation should be employed, if at all, as a *last* resort, not "as a tool for interpreting the statute"

on a par with other, normally employed interpretive tools. *Id.* Such a presumption could be applicable, if at all, only where Congress's purpose is largely inscrutable. It has no place where, as here, there are numerous *direct* indications of Congress's intent – including the statutory definition of "drug trafficking crime," Congress's admonition that a State-court felony conviction can constitute an "aggravated felony," and the circumstances surrounding the 1990 expansion of the definition of an "aggravated felony" to include a "drug trafficking crime."

No Full Embrace of the Presumption. In support of invoking a tie-goes-to-the-alien presumption, Lopez cites several decisions of this Court over the past 60 years. However, in none of those cases did the Court rely on such a presumption as part of its holding. Rather, only after deciding the cases in favor of the alien did the Court mention the presumption in *dicta*. *See, e.g., INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (Court overturns denial of asylum claim based on "the plain language of the [INA], its symmetry with the United Nations Protocol, and its legislative history. . . . We finds these canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."); *INS v. Errico,* 385 U.S. 214, 225 (1966) (after construing the INA as saving an alien from deportation despite the alien having misrepresented his status to gain entry into the United States, Court adds, "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello v. United States*, 376 U.S. 120, 128 (1964) (Court construes statutory deportation provision in favor of alien, then adds that even if the statute's meaning were in doubt, that doubt should be resolved "in favor of the alien."). Accordingly, despite the Court's occasional reference to the presumption as "longstanding" in nature, it has

never been fully embraced by the Court as part of a holding in a case.

No Reason to Presume that Congress Wishes Aliens to Prevail in Close Cases. It is worth noting that the presumption that Lopez seeks to invoke developed not as a result of any special solicitude for aliens facing deportation, but from a belief that Congress does not normally write irrational statutes. The Court first articulated the presumption in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), a deportation case that turned on whether petitioner Delgadillo had "entered" the United States within the previous five years; if so, he was subject to deportation. Although Delgadillo had lived continuously in the United States for 20 years, a ship on which he was working was torpedoed along the Florida coast in 1942, and survivors were brought to Havana, Cuba. The government argued that his arrival in Miami, Florida from Havana one week later should be deemed an "entry" for purposes of the relevant deportation statute. In rejecting that interpretation as "capricious," the Court explained:

> [T]he stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are asked to subject the alien are too irrational to square with the statutory scheme.

Delgadillo, 332 U.S. at 391. In other words, the courts interpret statutes in a manner that favors aliens facing deportation when not doing so will lead to capricious yet momentous results, not because Congress necessarily intended that aliens be given the benefit of the doubt in close cases.

Later decisions of this Court erroneously pointed to *Delgadillo* as creating a tie-goes-to-the alien rule. But the only rationale put forward in later decisions in support of such a rule was that the consequences of a deportation order are so heavy that it should not be issued in the absence of a clear mandate. For example, in a case involving efforts to deport a man convicted of two murders, the Court said:

> We resolve the doubts in favor of [the] construction [of the deportation statute presented by the alien] because deportation is a drastic measure and at times the equivalent of a banishment to exile, *Delgadillo v. Carmichael*, 332 U.S. 388. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

Amici respectfully request that the Court use this case to extinguish the notion that aliens are entitled to special solicitude in deportation proceedings. Justice Douglas was no doubt correct in *Fong Haw Tan* that a deportation decision has major consequences, but that is not a reason to bias the outcome in favor of one party or the other. The outcome of a deportation proceeding is just as important to society at large as it is to an alien felon facing deportation – the safety of all Americans depends on the government's ability to deport such aliens as quickly as possible.

The guiding principle in construing an immigration statute or any other federal statute is to arrive at an interpretation that best captures congressional intent. *See, e.g., Gade v. National Solid Waste Management Ass'n*, 505 U.S.

88, 98 (1992) ("The purpose of Congress is the ultimate touchstone"). In light of Congress's repeated efforts to expand the list of aggravated felonies that render an alien felon subject to *automatic* deportation, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien felon. There may be immigration provisions in which Congress has indicated a desire that the alien be given the benefit of the doubt, but 8 U.S.C. § 1101(a)(43) is not one of them. In light of Congress's repeated efforts to increase the pace of deportations, particularly in cases involving convicted felons, there can be no basis for maintaining a blanket rule that Congress intended the courts to give the benefit of the doubt to the alien in all deportation cases.

III. THE RULE OF LENITY IS INAPPLICABLE TO THIS CASE

Lopez also seeks to bias the decision in his favor by invoking "the rule of lenity." Pet. Br. 37-38. That effort is misguided; the rule of lenity has no application to this case.

The rule of lenity is a tool of statutory construction used by courts to assist in ascertaining congressional intent regarding the scope of criminal statutes. As Lopez notes, the rule of lenity states that "'ambiguity concerning the scope of *criminal statutes* should be resolved in favor of lenity,'" Pet. Br. 37 (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971) (emphasis added). Because 8 U.S.C. § 1101(a)(43) is not a criminal statute and deportation is not a criminal proceeding, the rule of lenity is of no benefit to Lopez.

Nor is the rationale underlying the rule of lenity applicable to Lopez. The rule is rooted in fundamental principles of due process, which mandate that no individual be

forced to speculate, at peril of indictment, whether his or her conduct is prohibited. To ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. *Dunn v. United States*, 442 U.S. 100, 107 (1979). Lopez has no basis for arguing that he lacked fair notice of the consequences of his misconduct. Lopez acted despite fair warning that his activities constituted a felony punishable by five years and prison and rendered him deportable under 8 U.S.C. § 1227(a)(2)(B)(i). Moreover, some months prior to Lopez's guilty plea, the Eighth Circuit ruled that all State drug felonies constituted "felon[ies] punishable under the [CSA]" amd thus an aggravated felony rendering the perpetrator subject to automatic deportation, regardles whether the State-law felony would also be a felony violation of the CSA. *United States v. Briones-Mata*, 116 F.3d 308, 310 (8th Cir. 1997). Accordingly, Lopez also had fair notice that his conviction would subject him to automatic deportation. In light of Lopez's receipt of fair notice of the consequences of his actions, Lopez cannot even lay claim to the rationale underlying the rule of lenity.

Lopez points alternatively to the fact that immigration law draws its definition of a drug trafficking crime from a criminal statute, 18 U.S.C. § 924(c)(2). Lopez cites to*Leocal* for the proposition that the rule of lenity should be applied in interpreting any statute that has both criminal and noncriminal applications because a single statute should not be given two inconsistent interpretations – one for use in criminal cases and one for use in noncriminal cases. *Leocal,* 543 U.S. at 12. Because § 924(c)(2) has criminal applications, this case must be decided in conformance with the rule of lenity, Lopez asserts. Pet. Br. 38.

Lopez's premise is incorrect: resolution of the issue before the Court cannot possibly have a bearing on application of § 924(c)(2) to any criminal case. Section 924(c) is a criminal statute that provides for sentencing enhancements for individuals who use, carry, or possess a firearm in relation to "any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A "drug trafficking crime" is defined in § 924(c)(2); it is this definition that Congress borrowed in connection with its creation of a list of "aggravated felon[ies]." Importantly, Congress limited sentence enhancement to crimes for which the perpetrator "may be prosecuted in a court of the United States." *Id.* Federal courts do not, of course, have jurisdiction to hear criminal cases involving alleged violations of State penal codes; accordingly, even if the Court rules that a State-law felony conviction qualifies as a "felony punishable under the [CSA]," and thus as a "drug trafficking crime," that ruling could not affect any conceivable criminal case involving a sentencing enhancement under § 924(c)(1). Even under the Eighth Circuit's ruling, the only criminal proceedings that can arise under § 924(c)(1) in federal court are indictments alleging felony violations of the CSA,[9] and nothing the Court could say in resolving this case would affect the status of felony violations of the CSA as "drug trafficking crime[s]." In sum, the rule of lenity cannot be invoked by Lopez to bias the interpretation of a "drug trafficking crime" in his favor.[10]

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[9] Or federal-law crimes of violence, as defined in § 924(c)(3).

[10] Lopez seems to believe that the government's case would be undercut by a finding that § 924(c)(1)'s provisions cannot be invoked to enhance sentences otherwise applicable to State-court criminal proceedings. *See, e.g.*, Pet. Br. 23-24 ("Petitioner has not located a single case in which the government prosecuted an individual under § 924(c) based on the carrying or use of a firearm during a state-law felony."). To the contrary, there is nothing inconsistent between a

(continued...)

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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[10](...continued)
finding that a "felony punishable under the [CSA]" (§ 924(c)(2)) includes State-law felonies and a finding that § 924(c)(1) cannot be used to enhance penalties for violations of State criminal laws. When Congress amended § 1101(a)(43) in 1990 to include a reference to § 924(c)(2)'s definition of a "drug trafficking crime," one can assume that it intended to incorporate that definition in accordance with the plain meaning of the words used in § 924(c)(2). It would have made little difference to the 1990 Congress that not all crimes falling within the definition of a drug trafficking crime could actually be subjected to sentence enhancement under § 924(c)(1).